# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1889.**

No. 780. 459

JAMES WALLACE PEAKE, PLAINTIFF IN ERROR,

*vs.*

THE CITY OF NEW ORLEANS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

**FILED SEPTEMBER 26, 1888.**

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a UNITED STATES OF AMERICA:

Circuit Court of the United States, Eastern District of Louisiana.

JAMES WALLACE PEAKE, Plaintiff in Error,
*vs.*
CITY OF NEW ORLEANS, Defendant in Error. } No. 11557.

Richard De Gray and Robert Mott, Esqs., for plaintiff in error; Walter H. Rogers, Esquire, for defendant in error.

*Transcript of Record.*

Writ of error returnable to the Supreme Court of the United States, at the city of Washington, D. C., on the second Monday of October, A. D. 1888.

1 *Petition. Filed April 6th,* 1887.

To the judges of the circuit court of the United States for the fifth circuit and eastern district of Louisiana:

The petition of James Wallace Peake, who resides in the city of New York and State of New York, and who is a citizen of said State, respectfully represents that the city of New Orleans, a municipal corporation chartered by the State of Louisiana and a citizen of said State, is justly and truly indebted to your petitioner in the sum of four thousand dollars, with interest at 8% per annum on two thousand dollars thereof from October 2, 1875, and with like interest on the remaining two thousand dollars thereof from October 26, 1875—

For this, to wit:

That petitioner is the holder and owner of two certain drainage warrants issued in the words and figures set forth in the copies thereof hereto annexed, the originals whereof are made part of this petition.

Petitioner further shows that said drainage warrants were issued under and in pursuance of act No. 30 of the sessions of the Legislature of the State of Louisiana for the year of 1871, No. 57 of the year 1861, No. 191 of the year 1859, and No. 165 of the year 1858, as well as of a certain contract entered into by said city of New Orleans and the Mexican Gulf Ship Canal Company, late of New Orleans, on or about the 25 day of April, 1871, and ratified by the Legislature of the State of Louisiana by act No. 73 of the sessions of the Legislature of said State of the year 1872, and said warrants remain wholly due and unpaid and are entitled to be paid in cash, as well by the issuance of and delivery to your petitioner by said city of New Orleans of the consolidated bonds, drainage series, set forth and provided for in section 13 of said act No. 73 of the year

1872, and the same are, moreover, under said contract and ratification thereof a personal and absolute debt of the said city of New Orleans.

2 Petitioner further shows that the contract aforesaid was entered into as follows, to wit: On or about the 25th day of April, 1871, before any work was commenced under said act No. 30 of the year 1871 and before said city of New Orleans in any manner undertook to perform the duties imposed on her by said act, said city, in and by ordinance No. 814, administration series (a copy whereof is herewith filed and made part hereof), proposed to said Miss. and Mexican Gulf Ship Canal Company that the said city of New Orleans would issue drainage warrants, as required by the act of Legislature No. 30 of 1871, for the work therein provided for, and, in case of non-collection or non-realization of taxes and assets in said act provided for, the same to bear 8% per annum interest, the said warrants to be issued with the understanding to be inscribed therein or endorsed thereon that the same should not be enforceable by suit or judgment, but if not paid in one year out of the proceeds of drainage taxes and assets they should be fundable in bonds of the city bearing eight per cent. per annum, interest payable semi-annually, having ten years to run, and with due provision for retiring the same and securing the punctual payment of interest and gradual extinction of the principal, and that the city should have power to sell said bonds or give the same in payment of the said work performed, but no sale or exchange should be made at a price less than eighty cents on the dollar, exclusive of interest, and any holder of a fundable warrant, after thirty days' notice, if not paid, might demand bonds for the same at eighty cents on the dollar.

3 Petitioner further shows that said proposition so contained in said ordinance as aforesaid was accepted by said Miss. and Mexican Gulf Ship Canal Company by commencing the work provided for in ordinance No. 820, No. 944, and No. 1632, Nos. 1252, 1359, and subsequent ordinances, administration series, copies whereof are herewith filed and also made part hereof, and on the faith of said proposition so made and accepted as aforesaid, as well as on the faith of said act No. 30 of 1871, No. 57 of 1861, No. 191 of 1859, and No. 165 of 1858, said work was commenced and carried on by said Miss. and Mexican Gulf Ship Canal Company and subsequently by Warner Van Norden, transferee thereof, until on or about the 6th day of June, 1876, when said Van Norden and said company transferred to said city of New Orleans the franchise, property, and assets thereof under and pursuant to act No. 16 of the year 1876, as will more fully appear by reference to said act No. 16 of the year 1876 and a copy of said transfer on file in this hon. court, in suit No. 11614, on the docket of said court and made part hereof, at which date the work had been done to the extent specified in the report herewith filed and made part hereof and marked report I, and thereafter the city of New Orleans, disregard- her obligations to go on and complete said drainage system, refused to collect said drainage taxes and judgments based on the assessment-rolls, and

passed an ordinance instructing the mayor to issue, and he did issue, his proclamation to parties owing assessments and judgments
4 not to pay the same, as will appear from copies of ordinance No. 6970 and said proclamation, herewith filed and made part hereof.

Petitioner further shows that said proposition and the acceptance thereof, as aforesaid, is and was from the date of said acceptance a contract between said city of New Orleans and said Miss. and Gulf Ship Canal Company for the completion of the entire work contemplated by the aforesaid acts of Legislature, which was duly ratified by act No. 73 of the year 1872 to the extent of making it obligatory on the city of New Orleans to issue bonds of the character in said act provided for by said city of New Orleans for the excavations, canals, revetments, and protection levees provided for by said act No. 30 and said acts of the Legislature; but the provision in said contract that said drainage warrants should not be enforced by suit and judgment and should only be fundable in bonds at the end of the year in case of non-collection of drainage taxes and assets was disregarded and rejected.

Petitioner further shows that said ratification related back to the date of the acceptance of said proposition by said company in May, 1871, and became part of the original contract between the city of New Orleans and canal company, with the same force, scope, and effect as if embraced in the provisions of said act No. 30 of 1871, and it contemplated the completion of the entire work by said act No. 30 of 1871 and said other acts provided for, and the issuance of
5 bonds of said city of New Orleans in payment thereof until the system of drainage was completed.

Petitioner further shows that drainage warrants were duly issued by said city of New Orleans in the form provided for in said ordinance No. 814 to said Miss. and Mexican Gulf Ship Canal Company, and whereby said company accepted, a copy of the form of which is herewith filed as a part hereof and marked "A," for work done, measured, and approved by said city of New Orleans as in said acts and ordinances provided for, until immediately after the passage of said act No. 73 of 1872, when the form was changed into that now sued on and made part hereof, as aforesaid, the said Van Norden having become transferee of said company on or about May 22nd, 1872.

And petitioner further shows that from and after the passage of said act No. 73 of 1872 said drainage warrants, in the forms aforesaid, were duly funded by the said city of New Orleans into the consolidated gold bonds, drainage series, in said act provided for, and said funding was continued from time to time as said warrants were issued for work done under said acts of the Legislature and said contract until about the end of December, 1875, when said city of New Orleans, without any justifiable cause, refused to keep said contract and fund the drainage warrants issued for the work done under the aforesaid contract and acts of the Legislature.

Petitioner further shows that the formalities required by said city of New Orleans in issuing and delivering said "drainage
6 series" of bonds was as follows: The city surveyor measured

the work done monthly and certified the amount to the department of improvements, and said department then issued a certificate to the department of public accounts, and at once the administrator of public accounts issued the drainage warrants, which was an order on the department of finance to pay the same, which was done if the administrators thereof had any money to the credit of said Mississippi and Mexican Gulf Ship Canal Company or its transferee on presentation; and, if not, said administrator of finance endorsed the date of presentation thereon, when the same bore interest at 8 % per annum. The warrant was again presented by the holder thereof to the department of finance, and the administrator of said department thereupon, on demand of said holder, issued bonds in exchange thereof at ninety cents on the dollar.

Petitioner further shows that the contract aforesaid was in all things duly kept and performed by said company and said Van Norden, transferee thereof, from the time of the commencement of the work until said transfer to the said city of New Orleans, in June, 1876, as aforesaid, and said contract could at no time after it was entered into and ratified as aforesaid be impaired or destroyed by any subsequent Legislature of the State of Louisiana or
7 amendments to the constitution thereof, and any and all such subsequent legislation and amendments to the constitution thereof are null and void and in violation of article 1, section 10, and the 15th amendment of the Constitution of the United States, prohibiting all legislation impairing obligations of contracts and protecting the rights of property.

Petitioner further shows that said warrants herein filed were payable to the order of said W. Van Norden and are by him endorsed, and that he is now a citizen of the State of New York and has been a citizen of said State for the past ten years, and could sue thereon in this honorable court.

Petitioner further shows that by the aforesaid ratification by the State of Louisiana of said contract, entered into by said city of New Orleans and said Miss. and Mexican Gulf Ship Canal Company, by said act No. 73 of 1872, *and* said city of New Orleans became personally and absolutely indebted for the excavations, canal, revetments, protection levees, and machinery contemplated and provided for by said act No. 30 of 1871 and previous acts relating to drainage and to holders of drainage warrants then issued or that might thereafter be issued therefor as said canals should be dug, excavations made, protection levees built, and machinery bought and furnished until the entire work of draining New Orleans was completed, which indebtedness said city of New Orleans might
8 discharge by payment in cash or by the issuance and delivery to said company and holders of drainage warrants issued for the excavations, canals, levees, revetments aforesaid of the 7 % consolidated gold bonds, drainage series, described in section 13 of said act 73 of 1872, and said city was to be reimbursed from all such drainage taxes, assets, and judgments as should not be required for the payment of drainage warrants, which drainage tax and assets it was the duty of the city of New Orleans to collect.

Wherefore petitioner prays for the citation of and after due proceedings had an absolute and unqualified judgment against said city of New Orleans in the sum of four thousand dollars, — thereof from October 21st, 1875, and with like interest on the remaining two thousand dollars thereof from October 26th, 1875, payable in cash or by the issuance and delivery to petitioner sufficient of the 7% consolidated gold bonds, drainage series, described in section 13 of act 73 of 1872, at ninety cents on the dollar, as will be equal to the aforesaid sum, interest, and costs, and that any and all other rights petitioner may have in the premises be reserved to him.

Petitioner further prays for all costs and general relief.

RICHARD DE GRAY,
ROBERT MOTT,
*Att'ys for Pet.*

It is agreed that the foregoing petition be submitted in the place of the original and amended petition heretofore filed herein,
9 and shall be filed as of the date of filing said original petition, and shall be regarded as the commencement of this suit, the same as if nothing had been previously filed or done herein; and The City of New Orleans, defendant herein, hereby accepts service hereof and agrees to plead thereto within 10 days.

New Orleans, March 2, 1888.

RICHARD DE GRAY,
*Att'y for Plaintiff.*
W. H. ROGERS, *City Att'y.*

*Order.*

Let this petition be filed and let the cause proceed under and according to the foregoing consent.

March 3rd, 1888.

EDWARD C. BILLINGS, *Judge.*

10 "A."

No. —. DEPARTMENT OF PUBLIC ACCOUNTS,
$—. NEW ORLEANS, ——, 187–.

Administrator of finance, city of New Orleans:

Pay to the order of the Miss. and Mexican Gulf Ship Company —— dollars out of any funds in the city treasury to the credit of said company.

This warrant, in case of non-realization or non-collection of assets provided for under act No. 30, Legislature of Louisiana, session of 1871, to bear eight per cent. per annum interest, and it is given and received with the understanding that it shall not be enforceable by suit and judgment, but if not paid within one year out of the proceeds of the drainage tax and assets it shall be fundable in bonds of the city, bearing eight per cent. per annum interest, payable semi-annually, having ten years to run, and with due provision for retiring the same and securing the punctual payment of interest and gradual extinction of the principal.

The city shall have power to sell said bonds or give the same in payment of the works performed, but no sale or exchange shall be made at a price less than eighty cents on the dollar, exclusive of interest, and any holder of any fundable warrant after thirty days' notice, if not paid in money, may demand bonds for the same at eighty cents on the dollar.

Charge act No. 30, Legislature of Louisiana, sessions of 1871.

——— ———,
*Administrator of Public Accounts.*

11 EXHIBIT "A," Being Copy of Warrants Sued on.

*Drainage Warrant.*

No. 174. DEPARTMENT OF PUBLIC ACCOUNTS,
$2,000. NEW ORLEANS, *October 2nd*, 1875.

To the administrator of finance, city of New Orleans:

Pay to the order of W. Van Norden, transferee of the Mississippi and Mexican Gulf Ship Canal Co., two thousand dollars out of any funds in the city to the credit of said company.

This warrant is issued in accordance with the provisions of act 30 of the session of the General Assembly of the State of Louisiana held in the year 1871, and the administrator of finance, on presentation of this warrant to him, will pay the same in cash in case there be any funds in the city treasury to the credit of the said Mississippi and Mexican Gulf Ship Canal Company; but should there be not sufficient funds to cash this warrant, then the administrator of finance is required to endorse upon the same the date of its presentation, and this warrant will bear interest at the rate of 8% per annum from and after the date of such presentation and endorsement until paid.

Charge Mississippi and Mexican Gulf Ship Company.

(Signed) J. G. BROWN,
*Administrator of Public Accounts.*

Presented for payment Oct. 2nd, 1875.

(Signed) E. PILSBURY,
*Administrator of Finance.*

(Endorsed:) W. Van Norden, transferee.

12 *Drainage Warrant.*

No. —. DEPARTMENT OF PUBLIC ACCOUNTS,
$2,000. NEW ORLEANS, *October 26th*, 1875.

To the administrator of finance, city of New Orleans:

Pay to the order of W. Van Norden, transferee of the Mississippi and Mexican Gulf Ship Canal Company, two thousand dollars out of any funds in the city treasury to the credit of said company.

This warrant is issued in accordance with the provision of act 30 of the session of the General Assembly of the State of Louisiana

held in the year 1871, and the administrator of finance, on the presentation to him of this warrant, will pay the same in cash in case there be any funds in the city treasury to the credit of the said Mississippi and Mexican Gulf Ship Canal Company; but should there not be sufficient funds to cash this warrant, then the administrator of finance is required to endorse upon the same the date of its presentation, and this warrant shall bear interest at the rate of 8 % per annum from and after the date of such presentation and endorsement until paid.

Charge Mississippi and Mexican Gulf Ship Canal Company.

(Signed) J. G. BROWN,
*Administrator of Public Accounts.*

Presented for payment Oct. 26th, 1875.

(Signed) E. PILSBURY,
*Administrator of Public Accounts.*

Endorsed: W. Van Norden, transferee.

13 Ordinance No. 814.

Administration series.

No. 11557.

Filed April 6th, 1887.

MAYORALTY OF NEW ORLEANS,
CITY HALL, *April 27th*, 1871.

No. 814, administration series.

An ordinance to provide for the more efficient drainage of the city of New Orleans and environs and their protection from inundation.

Whereas by the provisions of act No. 30 of the session of 1871 of the Legislature of Louisiana it is made mandatory upon the council of the city of New Orleans to provide on the part of the city for an extensive system of drainage, to lay out the lines and fix the location and dimensions of certain canals and levees, and in various ways to recognize the claims and accounts of and to make settlements unto the Mississippi — Mexican Gulf Ship Canal Company in performing the excavations of such canals and building of levees; and

Whereas the council of the city deems certain portions of said bill to put in question the right of the city to the proper control of its drainage system and its rights voluntary to contract for the work and agree upon a price for the same, and does not recognize
14 the validity or constitutionality of the said act in certain of its parts; yet, convinced of the importance of an effective drainage system, of the desire of the public for its accomplishment without further delay, and satisfied of the capacity and readiness of the said company to perform the work required by the city, it is deemed proper, by the council aforesaid, to ordain as follows:

SECTION 1. Be it ordained by the council of the city of New Orleans, That all matters appertaining to drainage and the protection of the city from inundation be placed under the immediate charge of the administrator of improvements, aided by the city surveyor.

SECTION 2. Be it further ordained, etc., That the mayor and administrator of finance shall be associated with the administrator of improvements as a standing committee on drainage, to act until the further pleasure of the council. It shall be the duty of said committee to prepare a plan of work to be entered upon immediately and to report to the council at its first meeting after the adoption of this ordinance what canals and levees or extension of present canals or levees are most urgently required, and upon approval of the same by the council the administrator of improvements shall authorize the Mississippi and Mexican Gulf Ship Canal Company to enter upon the performance of the said work under its direction.

SECTION 3. Be it further ordained, etc., That the city expressly declares and notifies the Mississippi and Mexican Gulf Ship
15 Canal Co. that it does not waive its right freely to contract for the work of excavating the canals and erecting the levees required with the said company or any other party, as may hereafter appear to the best advantage of the city, and that the directing or allowing the said company to enter upon and perform any portion of the said work laid down is not to be considered as implying their exclusive right to its performance or completion or continuing the same further otherwise than during the pleasure of the council.

The said company is further notified that such work and no other as shall be performed with the consent and approval of the council will be settled for as hereinafter provided.

1. The surveyor shall measure and certify the dimensions of all the canals and levees now existing along the line of the works entered upon, so far as the same may form part of the canals and levees to be constructed, the same to be allowed for by the company in deduction of their measurements of work performed and completed.

2. The canal work to be measured and certified monthly; the levee work also to be measured and certified monthly, so far as the same shall have been shaped and completed and sufficiently dried for the passage thereon of vehicles, it being the intention hereof that the levees shall have the full dimensions required after being dried and ready for use, and all the payments shall be based upon measurements made of them in that condition.

16 3. The earth removed from the canals and not required for the levees shall be the property of the city and disposed of as the city may deem proper.

4. The city will issue warrants for the payment of the work, as required by the act of the Legislature, and in case of non-realization or non-collection of assets provided for therein the same to bear 8% per annum interest, the said warrants to be issued with the understanding to be inscribed therein or endorsed thereon that they shall not be enforceable by suit and judgment, but if not paid within one year out of the proceeds of the drainage tax and assets they shall be fundable in bonds of the city bearing eight per cent. inter-

est, payable semi-annually, having ten years to run, and with due provisions for retiring the same and securing the punctual payment of interest and gradual extinction of the principal.

The city shall have power to sell said bonds or give the same for the payment of the work performed; but no sale or exchange shall be made at a price less than eighty cents on the dollar, exclusive of interest, and any holder of a fundable warrant after thirty days' notice, if not paid in money, may demand bonds for the same at eighty cents on the dollar.

5. The payments, certificates, and warrants issued to the said company shall be based upon and computed according to the measurements made as aforesaid.

17 SECTION 4. Be it ordained, etc., That nothing in this ordinance relating to canals and levees shall be construed as to imply that the earth taken from a canal and placed on its banks shall constitute a levee, but such deposits as the committee may decide to be necessary for levee purposes shall be paid for.

SECTION 5. Be it further ordained, etc., That the city expressly reserves the right at any time hereafter to contest at law or otherwise the constitutionality or validity of act No. 30 of the legislative session of 1871 or any portion thereof, and notifies the Mississippi and Mexican Gulf Ship Canal Company accordingly.

Adopted by the council of the city of New Orleans April 25th, 1871, the veto of the mayor to the contrary notwithstanding.

Yeas—Cockrem, Shaw, Dellassize, Remick, Bonzano.

Nays—Lewis, Walton.

A true copy.

(Signed) H. CONQUEST CLARKE, *Sec.*

18 Ordinance No. 820.

Administration series.

No. 11557.

Filed April 6th, 1887.

MAYORALTY OF NEW ORLEANS,
CITY HALL, *May 4th*, 1871.

No. 820, administration series.

Be it ordained, That the Mississippi and Mexican Gulf Ship Canal Company is hereby authorized to commence the following-named work, subject to the terms and conditions of ordinance No. 814, administration series:

1. Cleaning Hagan-avenue canal to a depth of twelve feet, excavating a tail race canal to connect with Orleans-street tail race, and widening and deepening Orleans tail race through city park.

2. Excavating Fourteenth-street canal through Metairie Ridge, with protection levees on upper side.

3. Widening and deepening Marigny canal from Bayou St. John to Elysian Fields street.

Adopted by the council of the city of New Orleans May 2, 1871.
Yeas—Cockrem, Shaw, Dellassize, Lewis, Walton, Bonzano.
(Signed) BENJ. F. FLANDERS, *Mayor.*

A true copy.
(Signed) H. CONQUEST CLARKE, *Secretary.*

19 Ordinance No. 944.

Administration series.

Filed April 6th, 1887.

MAYORALTY OF NEW ORLEANS,
CITY HALL, *June 29th*, 1871.

No. 944, administration series.

Resolved, That the drainage committee prepare a plan for the construction of a protection levee on or near the lake shore, which, after being approved of by the council, shall be the guide for the contractor and surveyor, under the direction of the administrator of improvements, in the execution of the work.

Approved by the council of the city of New Orleans June 28th, 1871.

Yeas—Cockrem, Shaw, Delassize, Remick, Lewis, Walton, Bonzano.

(Signed) B. F. FLANDERS, *Mayor.*

A true copy.
(Signed) H. CONQUEST CLARKE, *Secretary.*

20 Ordinance No. 1252.

Administration series.

No. 11557.

Filed April —th, 1887.

MAYORALTY OF NEW ORLEANS,
CITY HALL, *Dec. 13th*, 1871.

No. 1252, administration series.

Resolved, That the city of New Orleans take such legal steps as may be necessary to cause the immediate expropriation of such land and property as may be necessary for the proposed draining canal from Galvez street to Carrollton avenue, running parallel to the new canal, at a width of one hundred feet from the new canal or State property.

Adopted by the council of the city of New Orleans Dec. 12th, 1871.

Yeas—Cockrem, Shaw, Delassize, Remick, Walton, Bonanzo, Lewis.

(Signed) BENJ. F. FLANDERS, *Mayor.*

A true copy.
(Signed) H. CONQUEST CLARK, *Secretary.*

21 Ordinance No. 1362.

Administration series.

No. 11557.

Filed April 6th, 1887.

MAYORALTY OF NEW ORLEANS,
CITY HALL, *Feb'y 16th*, 1872.

No. 1362, administration series.

Be it ordained, That paragraphs one, two, and three of ordinance No. 820, administration series, adopted May 2, 1871, be amended and interpreted so as to read as follows:

First paragraph to read—

Excavating a tail race from Hagan avenue to Orleans street; widening, deepening, and extending Orleans tail race from Bayou St. John to Lake Ponchartrain; excavating the canal parallel to the new canal authorized by ordinance No. 1252, administration series, and cleaning out and deepening the Hagan, Carrollton, Galvez, and Broad street canals.

Second paragraph to read—

Excavating the upper-line canal near the old Carrollton railroad and parallel with the same, with protection levee on the upper side.

22 The third paragraph to read—

Widening and deepening Marigny canal from Bayou St. John to Elysian Fields street; widening and deepening the London-avenue canal from Broad street to the draining machine; widening and deepening Broad-street canal from Marigny canal to the line of trees on said canal; widening and deepening St. Bernard avenue canal from Broad street to Claiborn street:

Provided the council reserves the right to stop any portion of the foregoing work at any point of its progress.

Adopted by the council of the city of New Orleans Feb. 10th, 1872.

Yeas—Cockrem, Shaw, Delassize, Remick, Lewis, Walton, Bonzano.

(Signed) BENJ. F. FLANDERS, *Mayor.*

A true copy.
(Signed) H. CONQUEST CLARKE, *Secretary.*

23 Ordinance No. 1374.

Administration series.

No. 11557.

Filed April 6th, 1887.

MAYORALTY OF NEW ORLEANS,
CITY HALL, *Feb'y* 21, 1872.

No. 1374, administration series.

An ordinance concerning a drainage canal on Poydras street from Galvez street to Carrollton avenue, and in relation to the earth excavated on this and other canals.

SECTION 1. Be it ordained by the council of the city of New Orleans, That the contemplated drainage canal on the north side of the new canal, as adopted in the proceedings of October —, 1871, be so located that the said canal be dug out of the middle of Poydras street, commencing at Galvez street, to Carrollton avenue, the earth excavated to be thrown on the lower side of Poydras street.

SECTION 2. Be it further ordained, etc., That the earth excavated from said canal and all other draining canals between the new canal and Canal Carondelet be used first to fill up the Canal-street canal, and, secondly, in grading to a proper level the streets between said canal.

24 Adopted by the council of the city of New Orleans Feb'y 29th, 1872.

Yeas—Cockrem, Shaw, Delassize, Remick, Lewis, Walton, Bonzano.

(Signed) BENJ. F. FLANDERS, *Mayor.*

*Report of Committee on Drainage.*

NEW ORLEANS, *July 18th*, 1871.

To the city council of New Orleans:

The following plan is respectfully submitted for the approval of the council as the most practical and permanent one for the commencement of a lake-shore protection levee, viz:

Commencing at upper-line protection levee, extending in the lake to a depth not over one foot of water at low tide, running in a westerly direction to the new canal; also commencing at Pontchartrain railroad, in the same depth of water, running in a westerly direction to the proposed lower-line protection levee, being a distance of about two thousand feet.

(Signed) JOHN COCKREM,
*Administrator of Improvements and*
*Member of Draining Committee.*

Adopted by the council July 18th, 1871.

25 Ordinance No. 1359.

MAYORALTY OF NEW ORLEANS,
CITY HALL, *Feb'y 7th*, 1872.

SECTION 1. Be it ordained by the council of the city of New Orleans, That in addition to the several drainage districts described in an act of the Legislature to provide for leveeing, draining, and reclaiming swamp lands in certain portions of the parish of Orleans and Jefferson, approved March 18th, 1858, there shall be, and is hereby, constituted a fourth district or section to be comprised within the following-described limits or boundaries, viz:

Commencing on the left bank of the river Mississippi with the point of intersection with Lafayette avenue, thence continuing down said river to the point of intersection with Fisherman's canal, thence running back from said river a distance of 9,900 feet or thereabouts to Bayou Bienvenu and Florida Walk, thence continuing along Florida Walk for a distance of 15,914 feet or thereabouts so as to connect through a curved line of 338 feet additional with Lafayette and People's avenue at a point distant from the Mississippi river of 9,900 feet or thereabouts, and thence along Lafayette avenue to the place of beginning.

26 SECTION 2. Be it further ordained, That the lower-line protecting levee to connect the Mississippi river with Lake Pontchartrain is established as follows:

Commencing on the left bank of the Mississippi river at the lower limit of the fourth draining section, thence back from said river to the intersection of Bayou Bienvenu and Florida Walk a distance of 9,900 feet or thereabouts, thence on the lower line of said section along Florida Walk to Lafayette and People's avenue a distance of 15,914 feet or thereabouts, thence along People's avenue to the intersection with Mexico street a distance of 13,434 feet or thereabouts, thence with a northwest bearing for a distance of 3,450 feet or thereabouts to the intersection of Washington avenue and the lake-shore protection levee.

SECTION 3. Be it further ordained, That this ordinance shall take effect from and after its passage.

Adopted by the council of the city of New Orleans Feb'y 6th, 1872.

Yeas—Cockrem, Shaw, Delassize, Remick, Lewis, Walton, Bonzano.

(Signed) BENJ. F. FLANDERS, *Mayor*.

27 Ordinance No. 6970.

Administration series.

Be it resolved, That the mayor be authorized to issue his proclamation advising the people not to pay the drainage tax until the question is decided by the supreme court.

Adopted by the council of the city of New Orleans April 5th, 1881.

Yeas—Delamore, Fagan, Fitzpatrick, Guillotte, Huger, Mealey, Walsh.

JOS. A. SHAKESPEAR, *Mayor.*

*Proclamation.*

MAYORALTY OF NEW ORLEANS,
CITY HALL, *April* 6, 1881.

All persons of whom a tax for drainage in the city of New Orleans is demanded are hereby advised not to pay said drainage tax until the right to exact said tax has been settled by the decision of the supreme court of this State.

(Signed) JOS. A. SHAKESPEAR, *Mayor.*

28 *Transfer* (1.)

Copy of the act of sale of the effects of the Mississippi and Mexican Gulf Ship Canal Company to the city of New Orleans; passed before Gustave Le Gardeur, Jr., notary public, on the 7th day of June, 1876.

UNITED STATES OF AMERICA,
*State of Louisiana,*
*Parish of Orleans,*
*City of New Orleans:*

N. O., 7th June, 1876.
Sale of franchise No.—, Miss. and Mex. Gulf Ship Canal Co.
and
W. Van Norden, transferee, individually, to the city of New Orleans.

Be it known that on this seventh day of the month of June, in the year of our Lord one thousand eight hundred and seventy-six, and of the Independence of the United States of America the one hundredth, before Mr. Gustave Le Gardeur, Jr., a notary public, duly commissioned and sworn, in and for the parish and city aforesaid, therein residing, and in the presence of the witnesses hereinafter named and undersigned—

Personally came and appeared—

(1.) The Honorable Charles I. Leeds, mayor of the city of New Orleans, and herein duly authorized as such under and by virtue of ordinance Nos. 3479 and 3539, administration series,
29 adopted by the council of the city of New Orleans, respectively, on the 25th day of April & 23d day of May, 1876, and herein furthermore fully authorized under and by virtue of the provisions of act No. 16 of acts of 1876, approved February 24th, 1876.

(2.) Mess. John Mathers, Jr., and Samuel D. Moody, both of this city, and herein acting, the former as president and the latter as secretary of the Mississippi and Mexican Gulf Ship Canal Company, a duly organized corporate body of this State, domiciled in this city and herein acting in their said capacities under and by virtue of a resolution of the board of directors of the said Mississippi and Mexican Gulf Ship Canal Company, adopted at their sit-

ting *at* the*ir* third day of June, 1876, a duly certified copy of which said resolution is hereto annexed for reference.

(3.) And Warner Van Norden, Esq., also of this city, herein acting in his own name individually, and also as transferee and pledgee of the said Mississippi and Mexican Gulf Ship Canal Company, and under and by virtue of an act passed before Andrew Hero, Jr., a notary public of this city, on the twenty-second day of May, 1872.

And the said Mississippi and Mexican Gulf Ship Canal Company, through its president and secretary aforesaid, and the said W. Van Norden, as transferee and pledgee of the said company, by virtue of the aforecited act of the twenty-second day of May, 1872, before the said A. Hero, Jr., notary, declared that for the consideration and on the terms and conditions hereinafter set forth they do by the-
30 presents grant, bargain, sell, convey, transfer, assign, and set over, with a full guarantee against all troubles, debts, mortgages, claims, evictions, donations, alienations, or other encumbrances whatsoever, unto the said city of New Orleans, the said Charles J. Leeds, as mayor aforesaid, accepting and purchasing for and in the name of the city of New Orleans and under and by virtue of the authority in him vested by said ordinances Nos. 3479 and 3539, administration series, duly certified copies whereof are hereto annexed for reference, and also under and by virtue of the rights and powers conferred by said act No. 16 of the acts of 1876, and acknowledging due delivery and possession thereof, all and singular the rights, title, interest, share, claim, demand, franchises, privileges, contracts, and advantages, of every nature and kind whatsoever, which the said Mississippi and Mexican Gulf Ship Canal Company has or may have under and by virtue of act No. 30 of the Legislature of this State entitled An act to provide for the drainage of New Orleans, passed at the session of 1871, and of all other acts of the Legislature of this State, and which the said W. Van Norden, as transferee and pledgee aforesaid, has or may have under and by virtue of aforecited act passed on the twenty-second day of May, 1872, before the said Andrew Hero, Jr., notary.

And the said W. Van Norden, in his own name individually, declared that for the consideration and on the terms and conditions hereinafter set forth he does by these presents grant, bargain, sell, convey, transfer, assign, and set *forth* over, with a full guar-
31 antee against all troubles, debts, mortgages, claims, evictions, donations, alienations, or other encumbrances whatsoever, unto the said city of New Orleans, the said Charles I. Leeds, as mayor aforesaid, accepting and purchasing for and in the name of the said city of New Orleans, under and by virtue of the authority in him vested by said ordinances Nos. 3479 and 3539, administration series, and also under and by virtue of the rights and powers conferred by said act No. 16 of the acts of 1876, and acknowledging due delivery and possession thereof—

All and singular the following-described dredge-boats and derricks, together with the machinery, engine, tackle, apparel, and appurtenances, and all the necessaries thereto belonging, together wit h the hereinafter-mentioned articles and effects, to wit:

Dredge-boat No. 1, seventy feet long and thirty feet wide.
Dredge-boat No. 2, seventy feet long and thirty feet wide.
Dredge-boat No. 3, seventy feet long and thirty feet wide.
Dredge-boat No. 4, seventy feet long and thirty feet wide.
Dredge-boat styled the I. O. Noyes, sixty-two feet long and nineteen feet wide.
Dredge-boat styled "Clam-Shell" dredge, sixty feet long and thirty feet wide.
Dredge-boat known as the "Ridge boat," eighty-three feet long and thirty feet wide.
Four derricks accompanying respectively Nos. 1, 2, 3, and 4.
One steam-tug, known as the "Olive."
32 One barge for floating derricks.
One floating boarding-house.
One lot of buildings at Half-Way House.
One lot of large and small castings, including one heavy cast-iron mainmast, two heavy cast-iron topmasts, hoisting and surging drums, duplicate cog-wheels, and various small castings, etc., the whole more fully set forth in a detailed inventory on file in the office of the city surveyor.

The said Warner Van Norden, in his own name individually, is the owner of the above-described dredge-boats, derricks, and other effects and articles, *for* having acquired the same by purchase from the said Mississippi and Mexican Gulf Ship Canal Company by acts passed before the said A. Hero, Jr., notary, on the twenty-second day of November, 1872.

To have and to hold the said rights, title, interest, share, claim, demand, franchise, privileges, contracts, and advantages of the said Mississippi and Mexican Gulf Ship Canal Company and of the said W. Van Norden, as transferee and pledgee aforesaid, and the said dredge-boats, derricks, and other articles and effects above described unto the said city of New Orleans forever by virtue of these presents.

And the said Mississippi and Mexican Gulf Ship Canal Co., through its president and secretary aforesaid, and the said W. Van Norden, as transferee and pledgee aforesaid, and in his own name individually, declared that they do moreover by the- presents subrogate the city of New Orleans in and to all and singular the rights, actions, and remedies to which they are or may be entitled
33 under and by virtue of the aforesaid act No. 30 of 1871 or of all other acts of the Legislature of this State, and under and by virtue of the aforecited acts passed before A. Hero, Jr., notary, respectively on the twenty-second day of May and twenty-second day of November, 1872, hereby authorizing the said city of New Orleans to exercise and enjoy the said rights, actions, and remedies in the same manner and to the same extent as it, the said Mississippi and Mexican Gulf Ship Canal Company, and he, the said W. Van Norden, the transferee and pledgee, and in his own name individually, might or could have done.

The sale of the said rights, title, interest, share, claim, demand, franchises, privileges, contracts, and advantages by the said Mississippi and Mexican Gulf Ship Canal Co. and the said W. Van Norden, as transferee and pledgee aforesaid, and the sale of the said dredge-boats, derricks, and other articles and effects by the said W. Van Norden in his own name individually are made and accepted for and in consideration of the price and sum of three hundred thousand dollars ($300,000), payable in drainage warrants.

And now the said J. Mathers, Jr., and S. D. Moody, in their respective capacity, and the said Van Norden, as transferee and pledgee aforesaid and in his own name individually, declared that they have covenanted and agreed and do by these presents covenant and agree that the said sum of three hundred thousand dollars in drainage warrants shall be paid in full to the said W. Van Norden in consideration of the sales herein made, and also in full settlement of all existing claims for damages which the said Mississippi and Mexican Gulf Ship Canal Co. and the said W. Van
34 Norden, as transferee and pledgee aforesaid and in his own name individually, ever had or have now or may have against the said city of New Orleans, and the said Mississippi and Mexican Gulf Ship Canal Co., through its president and secretary aforesaid, does, moreover, by these presents fully authorize the said city of New Orleans to pay the said sum of three hundred thousand dollars in drainage warrants to the said W. Van Norden.

And now to these presents personally came and appeared the Hon. John G. Brown, administrator of accounts of the city of New Orleans, who, by virtue of the authority in him vested by said ordinance No. 3539, administration series, and of the rights and powers conferred by said act No. 16 of acts of 1876, and with the consent of the said Mississippi and Mexican Gulf Ship Canal Company, as is hereby declared and acknowledged by the said J. Mathers, Jr., and S. D. Moody, in their respective capacity and for and in the name of the said company, has presently and in the presence of the notary and witnesses undersigned handed over and delivered the same sum of three hundred thousand dollars ($300,000) in drainage warrants to the said W. Van Norden, who, as transferee and pledgee aforesaid and in his own name individually, with the full and entire consent of the said Mississippi and Mexican Gulf Ship Canal Co., as is hereby declared and acknowledged by the said J. Mathers and S. D. Moody in their respective capacity and for and in the name of the said company, hereby acknowledged the receipt of the same.

35 And now, for the purpose of providing for the payment of the warrants issued under and by virtue of these presents and of all other drainage warrants heretofore issued and outstanding, the said city of New Orleans, through its mayor aforesaid; the said Mississippi and Mexican Gulf Ship Canal Company, through its president and secretary aforesaid, and the said W. Van Norden, as transferee and pledgee aforesaid and in his own name individually, do by these presents covenant and agree that the existing rights and powers by the holders of drainage warrants under the several

acts of the Legislature of this State relative to drainage and drainage assessments shall remain unimpaired, and that the drainage tax and assessments shall be administered, collected, and paid in the manner and under the terms and conditions following, to wit:

The bureau of drainage collections shall be organized in an office at the city hall as follows, to wit:

A book-keeper, who shall be appointed by the city council and who shall keep such books and records, make such reports, and perform such duties as may be required by the administrators of finance and accounts. His salary shall not exceed two hundred dollars ($200) per month.

Said officer shall not in any manner obstruct or delay the business of the office; he shall be removable by the council, upon the complaint of the collector hereinafter provided for, for cause.

If desired by the said W. Van Norden, a duplicate set of books shall be made and placed subject to the use of the said collector.

Until the drainage warrants issued by virtue of these pres-
36 ents in conformity *by* said ordinance No. 3539, administration series, and all other drainage warrants heretofore issued or outstanding shall be liquidated and paid, the collection of drainage assessments shall be assigned to an officer who shall be selected by the said W. Van Norden and confirmed by the city council.

Said officer shall give a bond with good and solvent security in the sum of twenty-five thousand dollars ($25,000) for the prompt and faithful execution of the duties and powers provided by law for the collection of drainage assessments, and the prompt and efficient collection of the same in accordance with law and the business of his office shall be subject to the supervision of the administrators of finance and accounts. He shall receive a compensation in lieu of expenses of all kinds, including books, bills, stationery, legal services, costs of court or clerk's hire, of three hundred dollars ($300) per month and two and a half per cent. commission on collection of drainage assessments, and shall make such monthly reports as may be required by the administrators of finance and accounts.

Said collector shall be continued in office until the liquidation of the said drainage warrants issued by virtue of these presents or heretofore issued and now outstanding, and in case of death or resignation a successor shall be chosen as above provided for.

No receipt of the said collector for drainage assessments shall be valid unless countersigned by the administrator of finance.

The city council shall have the right to remove the said
37 collector for good and sufficient cause, and a successor shall be appointed as hereinabove provided.

All expenses, fees, and charges incurred in the collection of drainage assessments shall be paid out of the drainage fund.

All suits and judicial process and writs relating to or appertaining to the drainage assessments and taxes shall be continued as heretofore controlled by the city council and be conducted by the city attorney, but all writs of "*fieri facias*" to be issued as required by law and the judgment of the courts.

All parties owing drainage assessments shall have the right to

pay the same in drainage warrants at their face value and interest thereon, and said collector and administrator of finance shall receive the same in satisfaction of all drainage assessments.

All parties owing drainage assessments in the fourth drainage district shall be entitled, upon the prompt payment of the four-tenths of the whole assessment, to *our* extension of time for the payment of the remaining installments. The said six installments shall be paid yearly, as prescribed by an ordinance already adopted by the city council.

And now the said mayor, Charles J. Leeds, hereby promises for or binds and obligates the city of New Orleans, after the date of these presents, to issue no drainage warrants other than those issued by virtue of these presents in conformity with the said ordinance No. 3539, administration series, and such other drainage war-
38 rants as may now be issued and outstanding until said warrants have been fully liquidated and paid, and not to obstruct or impede, but, on the contrary, to facilitate by all lawful means the collection of the drainage assessments, as provided by law, until said warrants have been fully paid, it being well understood and agreed by and between the said parties hereto that collection of drainage assessments shall not be diverted from the liquidation of said warrants and payment of expenses, as hereinabove provided for, under any pretext whatsoever, until the full and final payment of the same.

And it is moreover well understood and agreed by and between the said parties hereto that all work heretofore done by said W. Van Norden, not certified, shall be measured by the city surveyor, and the same shall be paid for in drainage warrants in the usual form, and that, inasmuch as it has been claimed that certain collections of drainage funds have been applied by the previous administrations to general fund purposes, the said city of New Orleans will issue to the said Warner Van Norden the sum of twenty thousand dollars ($20,000) in drainage warrants in full satisfaction of the same.

And now, by virtue of the foregoing, Mississippi and Mexican Gulf Ship Canal Co., through its president and secretary aforesaid, and the said Warner Van Norden, as transferee and pledgee aforesaid, and in his own name individually, declared that they do by these presents remise and release and forever discharge the said city of New Orleans from and against any and all claims and demands of every nature and kind whatsoever which they ever had or have now or may have against the city of New Orleans.

39 And now it is moreover well understood, covenanted, and agreed that the said Mississippi and Mexican Gulf Ship Canal Co. and the said W. Van Norden, individually and as transferee and pledgee aforesaid, shall and will at all times protect the said city of New Orleans against and save it harmless from any and all claims and demands of every nature and kind whatsoever which may have been, can now be, or may hereafter be set up against the said city of New Orleans or against them or either of them in reference to drainage work, or arising out of their connection with the drainage of the city, or in any manner pertaining or relating to their acts, rights, franchises, privileges under said act No. 30 of 1871,

or in reference to the said dredge-boats, derricks, and other articles and effects; provided, however, that the guarantee herein set forth shall not be considered as extending any further than to warrant the city of New Orleans in the title to the boats and property herein transferred to it by the said W. Van Norden, and to save and to indemnify it, the said city of New Orleans, from any loss, injury, or damage arising from the acts and conduct of the said Mississippi and Mexican Gulf Ship Canal Co. or the said Warner Van Norden in reference to or arising from other connection with the drainage works herein referred to.

This done and passed at New Orleans, in my office, the
40 day, month, and year first above written, in the presence of Armand Pilot, Jr., and Gustave M. Letellier, competent witnesses, who have signed these presents with the said parties and me, notary, after reading the whole.

(Original signed)

CHAS. J. LEEDS, *Mayor.*
J. MATHERS, JR.
S. D. MOODY, *Secretary.*
J. G. BROWN, *Adm'r Pub. Ac.*
W. VAN NORDEN.
A. PILOT, JR.
G. M. LETELLIER.
G. LE GARDEUR, *Not. Pub.*

Registered in Conveyance Book 108, fol. 484.
New Orleans, June 7th, 1876.
(Signed) C. B. FISH, *Reg.*

A true copy of the original on and of record in my office.
New Orleans, June 9th, 1876.
G. LE GARDEUR, *Not. Pub.*

40½ *Work Done in the First Draining Section.*

41 "Report 1."

Statement of work done in the several draining sections of the city of New Orleans by the Mississippi and Mexican Gulf Ship Canal Co., as per bills on file in the office of the city surveyor.

42 Account of work done in the first draining district by the Mississippi and Mexican Gulf Ship Canal Co., as per bill book on file in the office of city surveyor.

| Date. | Cubic yards. | Cost. | Name of canal in which work was done. |
|---|---|---|---|
| Up to July 1, '71 | 18,475 | 9,237 00 | Bayou St. John. |
| Aug. 1, '71 | 7,558 | 3,779 00 | Do. & Orleans canal. |
| Sept. 1, '71 | 11,411 | 5,705 50 | Orleans canal. |
| Oct. 1, '71 | 14,613 | 7,306 50 | Do. do. |
| Nov. 1, '71 | 9,565 | 4,782 50 | Do. do. |
| Dec. 1, '71 | 14,544 | 7,272 00 | Do. do. |
| Jan. 1, '72 | 24,907 | 12,453 50 | Do. do. |
| Feb. 2, '72 | 28,820 | 14,410 00 | Do. do. |
| M'ch 1, '72 | 37,624 | 18,812 00 | Do. do. |
| April 1, '72 | 39,530 | 19,765 00 | Do. do. |
| May 1, '72 | 39,098 | 19,549 00 | Do. do. |
| June 1, '72 | 49,230 | 24,615 00 | Do. do. |
| July 1, '72 | 39,892 | 19,946 00 | Do. do. |
| Aug. 1, '72 | 33,196 | 16,598 00 | Do. do. |
| Sept. 1, '72 | 28,264 | 14,132 00 | Do. do. |
| Oct. 1, '72 | 27,567 | 13,783 50 | Galvez, Orleans, Broad,& Poydras canal. |
| Nov. 1, '72 | 27,728 | 13,864 00 | Galvez,Orleans,Broad,Carr. Ave.,& Hagan Av. |
| Dec. 1, '72 | 29,784 | 14,892 00 | Do. do. do. |
| Jan. 1, '73 | 26,076 | 13,038 00 | Orleans, Hagan, & Carrollton Ave. |
| Feb. 1, '73 | 27,867 | 13,933 50 | Orleans, Hagan, Galvez, & Carrollton Ave. |
| March 1, '73 | 26,134 | 13,067 00 | Orleans, Hagan,Carrollton, & Toulouse. |
| April 1, '73 | 26,851 | 13,425 50 | Orleans, Hagan, Carrollton, & Toulouse. |
| May 1, '73 | 21,246 | 10,623 00 | Orleans, Carrollton, & Toulouse. |
| June 1, '73 | 17,453 | 8,726 50 | Do. do. do. |
| July 1, '73 | 10,278 | 5,139 00 | Do. do. do. |
| 43 | | | |
| Up to Aug. 1, '73 | 11,131 | 5,565 50 | Orleans, Carrollton, & Toulouse. |
| Sept. 1, '73 | 7,812 | 3,906 00 | Orleans canal. |
| Oct. 1, '73 | 7,592 | 3,796 00 | Do. do. |
| Nov. 1, '73 | 6,741 | 3,370 50 | Do. do. |
| Dec. 1, '73 | 6,172 | 3,086 00 | Do. do. |
| Jan. 1, '74 | 5,553 | 2,776 50 | Do. do. |
| Feb. 1, '74 | 5,245 | 2,622 50 | Do. do. |
| Mar. 1, '74 | 4,936 | 2,468 00 | Do. do. |
| April 1, '74 | 619 | 309 50 | Do. do. |
| May 1, '74 | 7,935 | 3,967 50 | Do. do. |
| June 1, '74 | Extra grading. | 2,300 00 | Do. do. |
| June 1, '74 | 6,200 | 3,100 00 | Do. do. |
| July 1, '74 | Ex. grading | 2,600 00 | Orleans Ave. |
| July 1, '74 | do. do. | 1,900 00 | Do. do. |
| Aug. 1, '74 | 2,230 | 1,115 00 | Bayou St. John. |
| Sept. 8, '74 | 2,311 | 1,155 50 | |
| Oct. 1, '74 | 4,870¼ | 4,870 25 | Orleans Ave., grazing. |

| Date. | Cubic yards | Cost. | Name of canal in which work was done. |
|---|---|---|---|
| Oct. 1, '74 | 4,190 | 2,095 00 | |
| Nov. 1, '74 | 5,954 | 2,977 00 | New canal work. |
| Dec. 1, '75 | 2,019 | 1,009 50 | Spanish Fort. |
| Jan. 1, '75 | 900 | 450 | Do. do. |
| Jan. 1, '75 | 4,224 | 4,224 00 | Upper line levee. |

44 *Work Done in the Second Draining Section.*

45 Account of work done in the second draining district by the Mississippi and Mexican Gulf Ship Canal Co., as per bill book on file in the office of city surveyor.

| Date. | Cub. yards. | Cost. | Name of canal in which work was done. |
|---|---|---|---|
| Up to Aug. 1, '71 | 4,574 | 2,287 00 | Metairie road & 14th street. |
| | 3,968 | 1,984 00 | Near lake, at Jefferson & L. R. R. |
| | 7,902 | 3,951 00 | In lake, outside shore line. |
| Sept. 1, '71 | 10,829 | 5,414 50 | Metairie road & lake end. |
| Oct. 1, '71 | 18,767 | 9,383 50 | Upper draining canal. |
| | 19,947 | 7,480 12 | Do. protection levee. |
| | 11,755 | 4,408 12 | Metairie road. |
| Nov. 1, '71 | 21,605 | 10,802 50 | Upper draining canal. |
| " " | 11,824 | 4,434 00 | Do. protection levee. |
| | 4,482 | 1,680 75 | Metairie road levee. |
| Dec. 1, '71 | 14,817 | 7,408 50 | Do. draining canal. |
| | 6,703 | 2,513 62 | Do. protection levee. |
| | 4,410 | 1,653 75 | Metairie road levee. |
| Jan. 1, '72 | 11,760 | 5,880 00 | Do. draining canal. |
| | 2,518 | 891 75 | Metairie road levee. |
| | 5,859 | 2,197 12 | Do. protection do. |
| Feb. 1, '72 | 13,984 | 6,992 00 | Do. draining canal. |
| | 2,836 | 1,063 50 | Metairie road levee. |
| | 7,652 | 2,869 50 | Do. protection levee. |
| Mar. 1, '72 | 17,765 | 8,882 50 | 14th-street canal. |
| | 13,334 | 5,000 25 | 14th do. do. |
| Apr. 1, '72 | 16,168 | 8,084 00 | Do. line canal. |
| | 12,127 | 4,542 62 | Do. protection levee. |
| May 1, '72 | 17,696 | 8,848 00 | Do. line canal. |
| | 13,272 | 4,977 00 | Do. protection levee. |
| 46 | | | |
| Up to June 1, '72 | 17,619 | 8,809 50 | Upper line canal. |
| " " " | 13,213 | 4,954 87 | Do. do. do. |
| " " " | 3,296 | 412 00 | Do. protection levee. |
| " " " | 13,213 | 4,954 87 | Do. line canal. |
| " " " | 3,296 | 412 | protection levee. |
| " July 1, '72 | 15,977 | 7,988 50 | Do. line canal. |
| " " " | 11,981 | 4,492 87 | Do. protection levee. |
| " Aug. 1, '72 | 16,726 | 8,363 00 | Do. line canal. |
| " " " | 12,545 | 4,704 37 | Do. protection levee. |
| " Sept. 1, '72 | 18,231 | 6,836 62 | Do. do. do. |
| " " " | 24,829 | 12,414 52 | Do. line canal. |
| " Oct. 1, '72 | 28,404 | 14,202 00 | Do. do. do. |
| " " " | 20,102 | 7,538 25 | Do. line protection levee. |

| Date. | Cub. yards. | Cost. | Name of canal in which work was done. |
|---|---|---|---|
| Up to Nov. 1, '72 | 13,935 | 6,967 50 | Do. do. canal & lake shore. |
| " " " | 10,451 | 3,919 12 | Do. do. & lake shore levee. |
| " Dec. 1, '72 | 10,913 | 5,456 50 | Do. do. |
| " " " | 8,185 | 3,069 37 | Do. do. protection levee & L. S. |
| " Jan. 1,' 73 | 19,901 | 9,950 50 | Do. do. & lake shore. |
| | 14,926 | 5,597 25 | Do. do. & do. do. protection levee. |
| " Feb. 1, '73 | 17,304 | 8,652 00 | Do. do. & do. do. canal. |
| | 12,978 | 4,866 75 | Do. do. & do. do. protection levee. |
| " Mar. 1, '73 | 25,145 | 12,572 50 | Do. do. & do. do. canal. |
| | 25,792 | 9,672 00 | Do. do. & do. do. levee. |
| " Apr. 1, '73 | 23,488 | 11,744 00 | Do. do. & do. do. canal. |
| | 19,208 | 7,203 00 | Do. do. & do. do. levees. |
| 47 | | | |
| Up to May 1, '73 | 16,209 | 8,104 50 | Lake upper line & lake shore canal. |
| | 13,867 | 5,200 00 | Do. do. levee. |
| " June 1, '73 | 16,099 | 8,049 50 | Do. do. & 14th street. |
| | 13,470 | 5,051 25 | Do. do. levee. |
| " July 1, '73 | 18,982 | 9,491 00 | Do. do. canal. |
| | 12,838 | 4,814 25 | Do. do. levee. |
| " Aug. 1, '73 | 21,835 | 10,917 50 | Do. do. canal. |
| | 19,009 | 7,128 37 | Do. do. & lake shore levees. |
| " Sept. 1, '73 | 20,783 | 10,391 50 | Do. do. do. do. canals. |
| | 14,553 | 5,457 37 | Do. do. do. do. levees. |
| " Oct. 1, '73 | 26,999 | 13,499 50 | Do. do. do. do. canal. |
| | 19,553 | 7,332 37 | Do. do. do. do. levee. |
| " Nov. 1, '73 | 23,622 | 11,811 00 | Do. do. do. do. canal. |
| | 17,696 | 6,636 00 | Do. do. do. do. levees. |
| " Dec. 1, '73 | 15,903 | 7,951 50 | Do. do. do. do. canal. |
| | 11,077 | 4,153 87 | Do. do. do. do. levee. |
| " Jan. 1, '74 | 9,812 | 4,906 00 | Do. do. do. do. canal. |
| | 6,807 | 2,552 62 | Do. do. do. do. levee. |
| " Feb. 1, '74 | 16,318 | 8,159 00 | Do. do. do. do. canal. |
| | 15,006* | 5,627 25 | Do. do. do. do. levee. |
| " Feb'y 20, '84 | 52,875* | 26,437 50 | Do. do. do. do. levee. |
| | 305,082* | 152,541 00 | Do. do. do. do. canal. |
| " Dec. 15, 1873 | 274,574* | 137,287 00 | Do. do. do. do. levee. |
| " Mar. 5, '74 | 45,357 | 22,678 50 | Do. do. do. do. canal. |
| " Mar. 1, '74 | 22,540 | 11,270 00 | Do. do. do. do. do. |
| 48 | | | |
| Up to Mar., '74, | 20,924 | 7,846 50 | Upper line & lake shore levee. |
| | 20,413 | 10,206 50 | Do. do. canals. |
| | 16,364 | 6,136 50 | Do. do. levees. |
| Grading | | 2,700 00 | |
| Up to May 1, '74 | 23,190 | 11,595 00 | Do. & Melpomene canal. |
| | 6,959 | 2,609 62 | Do. Lake shore & 14th St. levees. |
| Grading | | 1,800 00 | |
| Up to May 19, '74 | 44,730 | 5,591 25 | Lake shore levee. |
| | 10,800 | 1,350 00 | Upper line do. |
| Ex. grading | | 4,200 00 | Do. do. do. |
| Up to June 1, '74 | 29,494 | 14,747 00 | Lake shore, Melpomene, and 14th St. canal. |
| | 23,207 | 8,702 62 | Lake shore, upper line, & 14th St. canal. |

*Paid on ac., y'ds 39,657, 228,811.

| Date. | Cu. yards. | Cost. | Name of canal in which work was done. |
|---|---|---|---|
| Up to July 1, '74 | Ex. grading | 7,250 00 | |
| | 30,486 | 15,243 00 | Lake shore, Melpomene, upper line, & 14th street canal. |
| | 11,461 | 4,297 87 | Upper line & lake shore levee. |
| " July 1, '74 | Ex. grading | 3,700 00 | Do. do. levee. |
| " Aug. 5, '74 | 32,379 | 16,189 50 | Do. do. 14th street, Melpomene canal. |
| | 15,700 | 5,887 50 | Do. do. lake shore levee. |
| " Sept., '74 | 35,170 | 17,585 00 | Do. do. lake shore, Melpomene, & Dublin Ave. |
| | 13,505 | 5,064 37 | Do. do. do. do. 14- St. |
| Oct. 1, '74 | 6,482⅔ | 6,482 40 | Do. do. levee. |
| | 98,540 | 12,317 50 | On lake shore. |
| " Oct. 1, '74 | 28,444 | 14,222 00 | Dublin Ave., lake shore, Melpomene, & lake shore. |
| | 16,422 | 6,158 25 | Upper line, 14- St. levees. |
| " Nov., '74 | 34,227 | 17,113 50 | Dublin, Melpomene, 14th St. canal. |
| 49 | | | |
| Up to Nov. 1, '74 | 9,213 | 3,454 87 | Upper line protection levee. |
| " Dec. 1, '74 | 19,825 | 9,912 50 | Do. do. Dublin, Melpomene canal. |
| " " " | 2,326 | 872 25 | Do. do. protection levee. |
| 31, " | 8,368 | 4,184 00 | Do. do. canal. |
| " " " " | 4,578 | 2,289 00 | 10th St. canal. |
| " " " " | 7,245 | 3,622 50 | Melpomene tail race. |
| " " " " | 7,509 | 2,815 87½ | Upper line levee. |
| " Feb. 2, '75 | 10,140 | 5,070 00 | Do. do. canal. |
| " " 1, '75 | 7,200 | 3,600 00 | 14th St. do. |
| " " " " | 8,750 | 4,375 00 | Melpomene tail race. |
| " " " " | 8,873 | 5,327 37½ | Do. do. levee. |
| " Mar. 1, '75 | 11,274 | 5,637 00 | Claiborne canal. |
| " " " " | 10,301 | 5,150 50 | Do. do. do. |
| " " " " | 8,210 | 4,105 00 | Melpomene tail race. |
| " " " " | 9,050 | 3,393 75 | Do. do. protection levee. |
| " Apr. 1, '75 | 3,098 | 1,549 00 | Melpomene tail race. |
| | 5,884 | 2,942 00 | Dublin canal. |
| | 10,799 | 5,399 50 | Do. do. do. |
| | 9,181 | 3,442 87½ | Do. do. levee do. |
| 21st, '75 | 44,218 | 5,527 25 | Do. do. do. |
| " May 1, '75 | 17,989 | 8,994 50 | Claiborne Ave. canal. |
| | 8,309 | 4,154 50 | Do. do. do. |
| | 5,266 | 2,633 00 | 10th St. do. |
| June 1, '75 | 10,175 | 5,087 50 | Do. do. |
| | 14,000 | 7,000 00 | 10th St. do. |
| 50 | | | |
| Up to June 1, '75 | 7,380 | 3,690 00 | Claiborne canal. |
| " July 1, '75 | 12,675 | 6,337 50 | Do. do. |
| | 10,203 | 5,101 50 | 10th St. do. |
| | 5,862 | 4,281 00 | Do. do. |
| " Aug. 1, '75 | 8,299 | 4,149 50 | Do. do. |
| | 10,648 | 5,324 00 | Do. do. |
| | 11,822 | 5,911 00 | 10th St. do. |
| | 5,387 | 5,387 00 | Upper line levee. |
| " Sept., '75 | 11,537 | 5,767 50 | Do. do. |
| | 11,935 | 7,967 50 | 10th St. do. |
| | 8,000 | 4,000 00 | Do. do. |
| " Oct., '75 | 16,047 | 8,023 50 | Do. do. |
| | 5,110 | 2,555 00 | Nashville Ave. canal. |

| Date. | Cu. Yards. | Cost. | Name of canal in which work was done. |
|---|---|---|---|
| | 10,357 | 5,178 50 | 10th St. do. |
| Up to Oct. 20, '75 | 100,273 | 12,534 12½ | Upper line levee. |
| " Nov. 1, '75 | 16,738 | 8,369 00 | Claiborne Ave. canal. |
| | 4,728 | 2,364 00 | Nashville do. do. |
| | 7,210 | 3,605 00 | Upper line do. |
| " Oct. 1, '75 | 6,310 | 2,366 25 | Do. do. levee. |
| " Nov., '75 | 33,490 | 4,186 25 | Do. do. do. |
| | 14,508 | 1,813 50 | 10th St. do. |
| " Dec. 1, '75 | 6,213 | 3,106 50 | Nashville do. |
| | 13,971 | 6,985 50 | Claiborne do. |
| " Jan. 1, '76 | 4,749 | 2,074 50 | Nashville do. |
| | 13,862 | 6,931 00 | Claiborne do. |

51 SECOND SECTION.

| | | | |
|---|---|---|---|
| Up to Jan. 1, '76 | 4,654 | 2,327 | Upper line levee. |
| | 3,416 | 1,708 | Peters Ave. |
| " Jan. 1, '76 | 1,000 | 500 | Lake shore levee. |
| | 1,000 | 500 | Do. do. do. |
| " Feb., '76 | 2,782 | 2,782 | Upper line do. |

52 *Work Done in the Third Draining Section.*

53 Account of work done in the third draining district by the Mississippi and Mexican Gulf Ship Canal Co., as per bill book on file in the office of city surveyor.

| Date. | Cu. yards. | Cost. | Name of canal in which work was done. |
|---|---|---|---|
| Up to July 1, '71 | 8,619 | 4,309 50 | In Marigny canal. |
| " Aug. 1, '71 | 8,538 | 4,269 00 | Marigny canal. |
| " Sept. 1, '71 | 11,874 | 5,937 00 | Do. do. |
| Oct. 1, '71 | 9,749 | 4,874 50 | Do. do. |
| Nov. 1, '71 | 9,789 | 4,894 50 | Do. do. |
| Dec. 1, '71 | 8,234 | 4,117 00 | Do. do. |
| Jan'y 1, '72 | 6,399 | 3,119 50 | Do. do. |
| Feb. 2, '72 | 10,544 | 5,272 00 | Do. do. |
| M'ch 1, '72 | 7,061 | 3,530 50 | Do. do. |
| April 1, '72 | 6,348 | 3,174 00 | Do. do. |
| May 1, '72 | 8,062 | 4,031 00 | Do. do. |
| June 1, '72 | 12,901 | 6,450 50 | Do. do. |
| July 1, '72 | 9,371 | 4,685 50 | Do. do. |
| Aug. 1, '72 | 10,820 | 5,410 00 | Do. do. |
| Sept. 1, '72 | 9,738 | 4,869 00 | Do. do. |
| Oct. 1, '72 | 5,084 | 2,542 09 | London Ave. |
| Nov. 1, '72 | 7,828 | 3,914 00 | " " & Marigny canal. |
| April 1, '73 | 5,000 | 2,500 00 | |
| May 1, '73 | 5,069 | 2,534 50 | London Ave. canal. |
| June 1, '73 | 8,564 | 4,282 00 | People's avenue canal. |
| July 1, '73 | 3,537 | 1,326 37 | Do. do. levee. |
| July 1, '73 | 19,343 | 9,671 50 | Do. do. & London Ave. |
| Aug. 1, '73 | 13,585 | 6,792 50 | Do. do. & do. do. |
| Aug. 1, '73 | 8,170 | 3,063 75 | Do. do. levee. |
| Sept. 1, '73 | 16,264 | 8,132 09 | Do. do. & London Ave. canal. |

| Date. | Cub. yards. | Cost. | Name of canal in which work was done. |
|---|---|---|---|
| 54 | | | |
| Up to Sept. 1, '73 | 9,861 | 3,697 87 | People's Ave. levee. |
| " Oct. 1, '73 | 13,906 | 6,953 00 | Do. do. & London Ave. canals. |
| Oct. 1, '73 | 6,680 | 2,505 00 | People's Ave. levee. |
| Nov. 1, '73 | 13,939 | 6,969 50 | Do. do. & London Ave. canals. |
| Nov. 1, '73 | 6,466 | 2,424 75 | People's Ave. levee. |
| Dec. 1, '73 | 11,538 | 5,769 00 | Do. do. & London Ave. canals. |
| Dec. 1, '73 | 6,463 | 2,423 62 | People's Ave. levee. |
| Jan. 1, '74 | 11,991 | 5,995 50 | Do. do. & London Ave. canals. |
| Jan. 1, '74 | 7,550 | 2,831 25 | People's Ave. levee. |
| Feb. 1, '74 | 12,538 | 6,269 00 | Do. do. & London Ave. canals. |
| Feb. 1, '74 | 7,498 | 2,811 75 | People's Ave. levee. |
| March 1, '74 | 13,191 | 6,595 50 | London & People's Ave. canals. |
| March 1, '74 | 7,399 | 2,774 62 | Do. do. levee. |
| April 1, '74 | 14,273 | 7,136 50 | Do. & do. do. canal. |
| April 1, '74 | 9,502 | 3,563 25 | Do. do. levee. |
| May 1, '74 | 13,126 | 6,563 00 | Do. & do. do. canal. |
| May 1, '74 | 6,526 | 2,447 25 | Do. do. levee. |
| June 1, '74 | 14,755 | 7,377 50 | Do. & do. do. canal. |
| June 1, '74 | 9,383 | 3,518 62 | Do. do. levee. |
| July 1, '74 | 19,636 | 9,818 00 | Do. & do. do. canal. |
| July 1, '74 | 13,323 | 4,996 12 | Do. do. levee. |
| Aug. 1, '74 | 19,936 | 9,968 00 | Do. & do. do. canal. |
| Aug. 1, '74 | 15,967 | 5,987 62 | Do. do. levee. |
| Sept. 1, '74 | 16,030 | 8,015 00 | Do. & do. do. canal. |
| Sept. 1, '74 | 12,492 | 4,684 50 | Do. do. levee. |
| 55 | | | |
| Up to Oct. 1, '74 | 17,552 | 8,776 00 | London & People's Ave. canal. |
| " Oct. 1, '74 | 11,040 | 4,140 00 | Do. do. levee. |
| " Nov. 1, '74 | 19,614 | 9,807 00 | Do. do. canal. |
| " Nov. 1, '74 | 13,582 | 5,093 25 | Do. do. levee. |
| " Dec. 1, '74 | 20,106 | 10,053 00 | Do. do. canal. |
| " Dec. 3, '74 | 15,838 | 7,919 00 | Do. do. levee. |
| " Dec. 1, '74 | 17,592 | 6,597 00 | Do. do. canal. |
| " Dec. 3, '74 | 13,858 | 5,196 75 | Do. do. levee. |
| " Feb. 1, '75 | 2,500 | 1,250 00 | London Ave. canal. |
| " Feb. 1, '75 | 9,740 | 4,870 00 | People's Ave. canal. |
| " Feb. 1, '75 | 8,523 | 3,196 12½ | Do. do. levee. |
| " Feb. 1, '75 | 34,357 | 4,294 37½ | Do. do. do. |
| " Mar. 1, '75 | 5,695 | 2,847 50 | London do. do. |
| " Mar. 1, '75 | 18,431 | 9,215 50 | People's do. do. |
| " Mar. 1, '75 | 16,131 | 6,049 00 | People's do. do. |
| " Apr. 1, '75 | 25,302 | 12,651 00 | Do. do. do. |
| | 7,411 | 3,705 00 | London do. canal. |
| | 21,507 | 8,065 12½ | People's do. levee. |
| " May 1, '75 | 17,810 | 8,900 00 | Do. do. canal. |
| | 7,127 | 3,563 50 | London do. do. |
| | 15,600 | 5,850 00 | People's do. levee. |
| " June 1, '75 | 20,150 | 10,075 00 | Do. do. canal. |
| | 17,650 | 6,618 75 | Do. do. levee. |
| | 56,600 | 7,075 00 | Do. do. |
| " July 1, '75 | 13,800 | 6,900 00 | Do. do. canal. |
| 56 | | | |
| Up to July 1, '75 | 12,075 | 4,528 12½ | People's Ave. levee. |

| Date. | Cu. yards. | Cost. | Name of canal in which work was done. |
|---|---|---|---|
| Up to Aug. 1, '75 | 17,030 | 8,515 00 | Do. do. canal. |
| | 14,900 | 5,587 50 | Do. do. levee. |
| " Sept. 1, '75 | 7,120 | 3,560 00 | London do. canal. |
| | 7,200 | 3,600 00 | People's do. do. |
| | 9,427 | 4,713 50 | People's do. do. |
| | 14,299 | 5,362 12½ | Do. do. levee. |
| | 21,728 | 2,716 00 | Upper line do. |
| | Grading --- | 2,000 00 | People's do. & M. & T. R. R. |
| " Oct. 1, '75 | 4,420 | 2,210 00 | London do. canal. |
| | 4,800 | 2,400 00 | People's do. do. |
| | 12,200 | 6,100 00 | Do. do. do. |
| | 5,200 | 2,600 00 | Do. do. do. |
| | 19,500 | 7,312 50 | Do. do. levee. |
| | Grading --- | 3,500 00 | Do. do. & M. & T. R. R. |
| | Do. --- | 3,200 00 | Do. do. do. |
| " Nov. 1, '75 | 17,065 | 8,532 50 | Do. do. canal. |
| | 14,932 | 5,599 50 | Do. do. levee. |
| " Dec. 1, '75 | 6,847 | 3,423 50 | London do. canal. |
| | 16,113 | 8,056 50 | People's do. do. |
| | 14,099 | 5,287 12½ | Do. do. levee. |
| " Jan. 1, '76 | 11,241 | 5,620 50 | Lower line canal. |
| | 9,836 | 3,688 50 | Do. do. levee. |
| " Feb. 1, '76 | 14,416 | 7,208 00 | Do. do. canal. |
| | 6,312 | 3,156 00 | London Ave. do. |

57 3RD SECTION.

| | | | |
|---|---|---|---|
| Up to Feb. 1, '76 | 12,614 | 4,730 25 | Lower line levee. |
| " " Mar., '76 | 12,800 | 6,400 25 | Do. do. canal. |
| | 11,200 | 4,200 00 | Do. do. levee. |
| " " Apr., '76 | 12,437 | 6,218 50 | Do. do. canal. |
| | 10,883 | 4,081 12½ | Do. do. levee. |
| | 69,217 | 8,652 12½ | Do. do. levee. |
| " " Apr. 25, '76 | 6,200 | 3,100 00 | People's Ave. canal. |
| | 5,428 | 2,035 00 | Do. do. levee. |
| " " May 26, '76 | 12,036 | 6,018 00 | Do. do. canal. |
| | 10,833 | 4,062 37½ | Do. do. levee. |

58 *Work Done in the Fourth Draining Section.*

59 Amount of work done in the fourth draining district by the Mississippi and Mexican Gulf Ship Canal Co., as per bill book on file in the office of city surveyor.

| Date. | Cubic yards. | Cost. | Name of canal in which work was done. |
|---|---|---|---|
| Up to Apr. 25, '76 | 13,400 | 6,700 | Lower line canal. |
| | 11,725 | 4,396 87½ | Do. do. levee. |
| " " May 26, '76 | 12,943 | 6,471 50 | Do. do. canal. |
| | 11,287 | 4,232 62½ | Do. do. levee. |

60 *Miscellaneous Work.*

61 Miscellaneous work done by the Miss. & Mexican Gulf Ship Canal Co., as per bills on file in the office of city surveyor.

Wharves & landings:

| | | | | |
|---|---|---|---|---|
| March 16, | '74. | For lumber, as per statement A | $2,993 | |
| | | " timber, " " " B | 2,391 | 07 |
| | | " hardware, " " " C | 634 | 92 |
| | | " pay-roll, " " " D | 3,118 | 57 |
| | | | 9,137 | 56 |
| Dec. 23, | '74. | For building bridge over People's Ave. canal | 1,642 | 37 |
| Jan., | 1875. | Bridge over Claiborne St. | 1,500 | 00 |
| Aug., | 1875. | Track, etc. | 4,300 | 00 |
| | | Taking down bridges on Claiborne canal | 434 | 00 |
| Jan., | 1876. | Building bridges on Dublin Ave. canal | 750 | 00 |

62 *Exception. Filed March 9, 1888.*

United States Circuit Court, Eastern District of Louisiana.

JAMES W. PEAKE
*vs.*
CITY OF NEW ORLEANS.

Now comes the defendant and for exception to plaintiff's petition says—

That the said petition discloses no cause of action, and that under the averments of said petition and under the laws and ordinances and other documents annexed thereto, petitioner is not entitled to the judgment prayed for by him on the face of said petition and annexes.

Wherefore respondent prays that this exception be maintained and plaintiff's demand be rejected at his costs, and for general relief.

W. H. ROGERS, *City Att'y.*

63 *Judgment.*

Extract from the Judgment Book.

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana. April Term, 1888.

NEW ORLEANS, SATURDAY, *April 28th*, 1888.

Court met pursuant to adjournment.

Present: Hon. Edward C. Billings, district judge.

JAMES WALLACE PEAKE
*vs.*
CITY OF NEW ORLEANS. } No. 11557.

This cause came on this day to be heard on the exception herein

filed by the defendant on the ninth day of March, A. D. 1888—present, Richard De Gray, Esq., for plaintiff; Walter H. Rogers, city att'y; White and Saunders and Harry H. Hall, for defendant—and was argued by counsel for the parties, respectively, and submitted; on consideration whereof it is now ordered, adjudged, and decreed that the said exception be maintained and the plaintiff's suit be dismissed with costs.

64 Judgment rendered April 28th, 1888.
Judgment signed May 3, 1888.

EDWARD C. BILLINGS, *Judge.*

*Motion for Writ of Error. Entered and Filed May* 5, 1888.

United States Circuit Court, Eastern District of Louisiana.

JAMES WALLACE PEAKE
*vs.*
CITY OF NEW ORLEANS. } No. 11557.

On motion of Richard De Gray and Robert Mott, attorneys for plaintiff, and on suggestion to the court that there is error in the final judgment rendered herein on the 28th day of April, 1888, and signed on the third day of May, 1888, and that plaintiff is aggrieved thereby and desires to have the same removed on a writ of error by the Supreme Court of the United States—

It is ordered that plaintiff be allowed a writ of error from said judgment, returnable before the Supreme Court of the United States on the second Monday of October, 1888, upon giving bond

65 in the sum of two hundred and fifty dollars, conditioned as the law directs, the same to operate as a supersedeas.

*Bond for Writ of Error. Filed May 8th,* 1888.

Know all men by these presents that we, James Wallace Peake and Frank E. Gibbs, as surety, are held and firmly bound unto the city of New Orleans in the full and just sum of two hundred and fifty dollars, to be paid to the city of New Orleans, her certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, jointly and severally, by these presents.

Sealed with our seals and dated this seventh day of May, in the year of our Lord one thousand eight hundred and eighty-eight.

Whereas lately, — a circuit — of the United States, fifth judicial circuit, holding sessions in and for the eastern district of Louisiana, in a suit depending in said circuit court, wherein James Wallace Peake is plaintiff and The City of New Orleans is defendant, judgment was rendered against said James Wallace Peake, plaintiff, and in favor of The City of New Orleans, defendant, and the said

66 James Wallace Peake having obtained a writ of error and filed a copy thereof in the clerk's office of the said circuit court to reverse the judgment in the aforesaid suit, and a citation directed to the city of New Orleans citing and admonishing her to

be and appear at the Supreme Court of the United States, at Washington, the second Monday of October next:

Now, the condition of the above obligation is such that if the said James Wallace Peake shall prosecute his writ to that effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in the presence of—

JAMES WALLACE PEAKE,
By RICHARD DE GRAY, *Att'y.*
FRANK E. GIBBS.

Bond approved.
EDWARD C. BILLINGS, *Judge.*

67 UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

CLERK'S OFFICE.

I, Edward R. Hunt, clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, do hereby certify that the foregoing 66 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had, together with all the evidence adduced, on the trial of the case of James Wallace Peake *vs.* City of New Orleans, No. 11557 of the docket of the said court.

Seal U. S. Circuit Court for the 5th Circuit & Eastern District of La.

Witness my hand and the seal of said court, at the city of New Orleans, this 5th day of July, A. D. 1888.

E. R. HUNT, *Clerk.*

I, Edward C. Billings, United States judge for the eastern district of Louisiana, do certify that Edward R. Hunt, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, was, at the time of signing said certificate, and is now the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand, at the city of New Orleans, in said district, this 5 day of July, A. D. 1888.

EDWARD C. BILLINGS, *Judge.*

68 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States in and for the fifth circuit and holding sessions for the eastern district of Louisiana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between James Wallace Peake, plaintiff, and

The City of New Orleans, defendant, a manifest error hath happened, to the great damage of the said James Wallace Peake, plaintiff, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Samuel F. Miller, associate justice *chief justice* of the said Supreme Court of the United States next in precedence, the office of chief justice being vacant, this 8th day of May, in the year of our Lord one thousand eight hundred and eighty-eight.

Seal U. S. Circuit Court for the 5th Circuit & Eastern District of La.

E. R. HUNT,
*Clerk of the United States Circuit Court for the Eastern District of Louisiana.*

69 [Endorsed:] United States circuit court. No. 11557. James Wallace Peake *versus* The City of New Orleans. Writ of error. No. —. U. S. circuit court, eastern district of Louisiana. Filed May 8, 1888. E. R. Hunt, clerk.

70 THE UNITED STATES OF AMERICA:

Circuit Court of the United States, Eastern District of Louisiana.

The President of the United States to the city of New Orleans, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, wherein James Wallace Peake is plaintiff in error and The City of New Orleans is defendant in error, to show cause, if any there be, why the judgment rendered against the said City of New Orleans, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Samuel F. Miller, associate justice of the Supreme Court of the United States, this 10 day of May, in the year of our Lord one thousand eight hundred and eighty-eight.

EDWARD C. BILLINGS, *Judge.*

71 [Endorsed:] United States circuit court, eastern district of Louisiana. No. 11557. James Wallace Peake *vs.* The City of New Orleans. Citation.

*Marshal's Return.*

Received May 10, 188–, by the U. S. marshal, and on the same day I served a true copy of the within citation in error on the city of New Orleans by handing the same to Hon. Jos. A. Shakspeare, mayor of said city, in person, at the mayor's office, in the city hall, in said city of New Orleans.

R. B. PLEASANTS,
*U. S. Marshal,*
By JNO. BAKER, *Dep'ty.*

On the 11th day of May, 1888, personally appeared before me John Baker, deputy U. S. marshal for the eastern district of Louisiana, and deposes and says that he served a true copy of the within citation in error on The City of New Orleans, defendant in error, as stated above.

JNO. BAKER.

Subscribed and sworn to before me this 11th day of May, 1888.

[Seal U. S. Circuit Court for the 5th Circuit & Eastern District of La.]

E. R. HUNT, *Clerk.*

Endorsed on cover: E. Louisiana C. C. U. S. No. 780. James Wallace Peake, plaintiff in error *vs.* The City of New Orleans. Filed September 26, 1888.

# IN THE SUPREME COURT OF THE UNITED STATES.

JAS. W. PEAKE
*vs.*
CITY OF NEW ORLEANS. } No. 852.

Inasmuch as the following-numbered cases are of like nature and relative to the same question, to wit, Nos. 852 and 41, it is agreed that said cause No. 852 be transposed and tried in the place of No. 41; and as the same questions are likewise involved in cases No. 459 & No. 460, it is agreed that said No. 459 be heard together with said No. 852.

It is further agreed that this agreement be substituted for the motion to consolidate said causes, now pending.

That the said causes No. 41 and 460 are to be controlled by the decisions to be rendered in the other above-numbered causes, No. 852 and No. 459.

THOS. J. SEMMES,
*Of Counsel for Appellants & Pl'ffs in Error.*

RICHARD DE GRAY,
*Of Counsel for Appellants & Plaintiffs in Error.*

CARLETON HUNT,
*City Attorney of New Orleans, for Appellee & Def't in Error.*

New Orleans, Dec. 12, '89.

Endorsed: Filed Dec. 16, 1889.

Office Supreme Court U. S.
FILED.
APR 25 1890
JAMES H. McKENNEY,
CLERK.

# Supreme Court of the United States.

OCTOBER TERM 1889.

No. 1,234.

JAMES WALLACE PEAKE, APPELLANT,

*versus*

THE CITY OF NEW ORLEANS, APPELLEE.

No. 780.

JAMES WALLACE PEAKE, PLAINTIFF IN ERROR,

*versus*

THE CITY OF NEW ORLEANS,
DEFENDANT IN ERROR.

RICHARD DEGRAY,
*Counsel for Appellant and Plaintiff in error.*

# Supreme Court of the United States.

OCTOBER TERM 1889.

No. 1,234.

JAMES WALLACE PEAKE, APPELLANT,

*versus*

THE CITY OF NEW ORLEANS, APPELLEE.

No. 780.

JAMES WALLACE PEAKE, PLAINTIFF IN ERROR,

*versus*

THE CITY OF NEW ORLEANS,
DEFENDANT IN ERROR.

The issues in the above cases are so much better presented in suit No. 1,234 that we will specially ask the Court's attention to the record in that case.

On the 9th day of May, 1887, the Circuit Court of the United States, for the Eastern District of Louisiana, rendered a judgment in favor of complainant and against the City of New Orleans for $6,000, with interest at 8 per cent per annum, from July 9, 1875, until paid, payable out of drainage funds, (page 212 of Record).

This judgment was based on three certain drainage warrants of $2,000 each, which will be fully described hereafter. (Record, pp. 201, 239, 240.)

After this judgment became final, execution was issued thereon, and after due demand by the Marshal was returned *nulla bona*. (Record, pp. 212, 213.)

This judgment, execution and return are made the basis of the present suit, No. 1,234, for an accounting of the drainage fund. (Record, pp. 9 and 10.)

The duties and obligations of the city, toward that fund, will appear from a review of the Statutes hereinafter set forth.

On the 18th of March, 1858, the legislature of the State of Louisiana passed an act:

> "To provide for leveeing, draining and reclaiming swamp lands in certain portions of the parishes of Orleansand Jefferson." (Page 1 of statutes annexed.)

And divided the lands to be drained into three districts, and provided that, all that portion of the parish of Orleans lying and being within the following limits, viz (Statutes, p. 1):

> "Beginning at the Mississippi River at Julia street, following said street to the Canal of the New Orleans Canal and Banking Company, following said canal as far as Lake Pontchartrain, along said lake to Bayou St. John, following said bayou to the Canal Carondelet, along said canal to St. Peter street, along St. Peter street to the river, following the banks of the river to the starting point, shall constitute the First Draining District."

And further provided that (Statutes, p. 1)

> "The following portions of the parishes of Orleans and Jefferson, viz: beginning at the Mississippi River at the upper side Julia street, along Julia street to Mobile Landing, along said landing to Delord street,

along Delord street and the upper side of the canal of the New Orleans Canal and Banking Company, following said canal to Lake Pontchartrain, along the shores of said lake to the Jefferson and Pontchartrain Railroad, following said railroad to the river Mississippi, and following the banks of said river to the starting point, shall constitute the Second *Leveeing* and Draining District."

And the Act further provided that (Statutes, p. 1):

"All that portion of the parish of Orleans lying and being within the following limits, viz: from the river Mississippi, at St. Peter street, along the lower side of said street to Canal Carondelet, following said canal to Bayou St. John, along said bayou to Lake Pontchartrain, along the shores of said lake to Lafayette Avenue, following said avenue to the river Mississippi, along the banks of said river to the starting point, shall constitute the Third *Leveeing* and Draining District."

The Second District being on the upper or up river side of New Orleans, and the Third District on the lower or down stream side of New Orleans, were called Leveeing and Draining Districts, while the First District, or centre of the above territory, was called simply the "First Draining District."

The Second Draining District was partly in the parish of Orleans and partly in the parish of Jefferson. (Statutes, p. 1.)

For the purpose of carrying the above Act into execution, Boards of Commissioners were provided for each of the above districts, (Statutes, p. 1,) and their rights, powers and duties were fully defined. (Statutes, pp. 2 and 3.)

It was the duty of such commissioners to have plans made, accurately designating the limits of the section or district to be drained; and, as far as possible, the sub-divisions of the property therein contained, and the names of the proprietors; also the dimensions and directions of the canals intended to be dug, and the place where the steam engines were to be placed.

These plans were to be deposited in the mortgage office of the parish where the land was situated; certain notices were to be given by publication in the newspapers, and then applications were to be made by petition to the courts of the proper parish, and after proper proceedings had, judgments were to be rendered decreeing the lands to be subject to a first mortgage lien and privilege in favor of said Commissioners for such amounts as might be assessed upon such property for its proportion of the costs of draining such section or district, and interest thereon at six per centum per annum from demand thereof; and this decree was to be recorded in the mortgage office of the parish where the land was situated. (Statutes, pp. 3 and 4.)

The Boards of Commissioners were thereafter authorized to levy an assessment for raising funds to defray the expenses of draining the land, upon each superficial square foot thereof within the prescribed territory; which assessments were to be enforced by *suit and jugdment.* (Statutes, pp. 4 and 5.)

The next year (1859) another act was passed, sup-

plementary to the foregoing, being No. 191 of that year, authorizing the Commissioners to issue bonds to provide funds to commence the drainage work and directing the said Commissioners to fix the amount of assessment to be levied upon each superficial foot of land, which should be payable in installments. (Statutes, pp. 6 and 7.)

Two years later, (1861), another act was passed (being No. 57 of that year,) providing an efficient and summary mode of collecting said assessment instead of by suit and judgment as theretofore provided, as follows to wit: (Statutes, pp. 8 and 9.)

As soon as an assessment was made, notice thereof was to be given, and a copy of the assessment roll with *the names of the owners and property* assessed was to be filed in Court, and proper proceedings had, and notices were to be published, for all persons whom it might concern to show cause why said assessment rolls should not be approved and homologated, and thereafter the same were to be approved and homologated, and such approval and homologation the law declared:

> "Should be a judgment against the property assessed and the owner thereof, on which execution might issue as on judgments rendered in the ordinary mode of proceedings."

Pursuant to the above laws commissioners were duly appointed, qualified, and entered upon, the discharge of the duties of their offices in said First and Second Draining Districts, and proper proceedings were had by them in the proper courts, which

resulted in the declaring of the first mortgage etc., in each of said first and second districts; that in the First District bears date August 24, 1861, (Record, pp. 115, 116), and that in the Second District for that portion of the land in the parish of Orleans, the 9th day of February, 1861, (Record, pp. 156, 157), and for that portion of the land in the parish of Jefferson, the 29th day of April, 1861, (Record, pp. 144 to 146).

On the 12th of September, 1861, a resolution was passed by the Board of Commissioners in the First Draining District, levying an assessment of $3\frac{3}{10}$ mills upon each superficial or square foot of land situated within the limits of that district; $\frac{1}{10}$ thereof to be paid within the ensuing twelve months. (Record, p. 113).

On the 11th of March, 1861, a resolution was passed by the Board of Commissioners in the Second Draining District, levying an assessment of 2 mills per superficial or square foot on all the lands within the limits of that district, and $\frac{1}{10}$ thereof was to be collected each year. (Record, p. 113).

Proper assessment rolls were made for each of the above districts and filed in the proper courts, and proper proceedings had thereon, which resulted in a judgment of homologation of said rolls as follows:

In the First District on the 11th of March, 1863; in the Third District Court, parish of Orleans, for the first installment, being ten per cent. thereof. (Record, pp. 117 and 118.)

After the rendition of this judgment, at the suit of

said Commissioners in said First District, the City of New Orleans, a drainage tax-payer on said rolls appeared, and appealed from a judgment rendered against her, and was allowed an appeal therefrom to the Supreme Court of Louisiana, returnable on the first Monday of November, 1863 (Record, pp. 374 and 375), but subsequently abandoned the same by not completing and filing the Record in said Supreme Court (Record, pp. 384 and 385), and thereafter acquiesced in and ratified said judgment by paying a part thereof, as will be shown hereafter. (Record, pp. 344, 345 and 473, and 518 to 521 )

In the Second Draining District, for that portion situated above Toledano street, and in the then parish of Jefferson, the judgment of homologation of the assessment rolls was rendered on the 15th of March, 1869 (Record, pp. 146 and 148); and for that portion of said district situated below Toledano street, and in the parish of Orleans, said judgment of homologation was rendered on the 11th of November, 1868. (Record, pp. 158 and 159.)

The Commissioners for said First and Second Districts continued in office until April, 1871, and some canals had been dug by them, but the extent thereof is not definitely shown. This was the condition of the law, and the legal proceedings had thereunder, in March, 1871, when the legislature passed Act No. 30 of that year (Statutes, p. 9 to 13) which abolished the above Boards of Commissioners, transfered to the Board of Administrators of the City of New Orleans all money assessments and claims for drain-

age in their hands or under their control, all titles to real estate, all books, plans, tableaux and judgments in their favor, and said Board of Administrators were subrogated to all the rights, powers and facilities of said Commissioners; and said Administrators were directed to collect the balance due on the assessments as shown by the books of said First and Second Drainage Districts, which *assessments* were *confirmed* and made exigible. (Statutes, pp. 11 and 12).

Said Board of Administrators were also directed to make assessments of two mills per superficial foot on the lands in the *Third* Draining District, and on such other lands as might be brought within the protection levees contemplated by said Act No. 30 of 1871; and said Administrators were commanded to enforce and collect said assessments in time, to provide for the payment of certain warrants to be issued to the Mississippi and Mexican Gulf Ship Canal Company (which was to do the work under said Act No. 30 of 1871) at the date of their issuance, and this work, according to the requirements of the statute, was to amount to $12,500 per month, and was to be increased to not less than $25,000 per month, (Statutes, p. 11); and all funds collected were to be placed to the credit of said Mississippi and Mexican Gulf Ship Canal Company, and held as a fund to be applied SOLELY for the drainage of New Orleans and Carrollton. (Statutes, p. 12.)

The width and depth of the canals as dug, and the protection levees as built were to be measured by

the city engineer and be certified by him, and the Administrator of Public Accounts, on presentation to him of said Engineer's certificate, was to draw his warrant on the Administrator of Finance in payment of said work, at the rate of 50 cents per cubic yard for excavations made, and 50 cents per cubic yard for protection levees built, and should said warrants not be paid on presentation, they were to bear interest at 8% per annum from the date of said presentation. (Statutes, p. 11.)

These warrants were called Drainage warrants, and three of them for $2,000 — each numbered 115, 116 and 122, all dated July 9, 1875, were reduced to judgment by the Circuit Court against the city of New Orleans on the 9th day of May, 1887, and payable out of drainage fund (Record, p. 212), upon which judgment, execution issued, and was returned *nulla bona* after due *demand* (being the judgment, execution and return already referred to) which are made the basis of the present suit, No. 1,234, against the City of New Orleans, which is brought for the benefit of complainant and such other parties as might intervene and offer to pay their share of costs and counsel fees.

Under this invitation Mrs. Mary Mitchell, executrix, etc., filed an intervening bill on the 10th day of December, 1889 (Record, pp. 20 and 21) based on five drainage warrants amounting to $8,000; and under the same invitation James Jackson filed his intervening bill on the 7th day of December, 1888 (Record, pp. 28 and 29), as a holder and owner of a

judgment for $45,000, based on drainage warrants issued pursuant to Act No. 16, of July, 1876 (Statutes, pp. 15 and 16). No question of the legality or illegality can therefore be raised on the issue of the warrants reduced to judgment as aforesaid.

In fact, it is proper to observe that there never has been any question as to the legality of the issue of any of the drainage warrants; either those paid or those outstanding, for all were issued in exact conformity with the law and for the consideration therein expressed, of which there are now outstanding two kinds, to-wit: those issued for canals dug and levees built, dated prior to June 6, 1876, which may be called "*work* warrants," and those issued pursuant to said Act No. 16, of 1876, for the purchase of the company's boats, tools, implements and franchise, which may be called "purchase warrants."

The plan as laid down in said Act No. 30, of 1871, was to build a protection levee around the City of New Orleans, commencing at the Mississippi River above Carrollton, running thence to Lake Pontchartrain, thence along the lake shore to a short distance below Milneburg, on Lake Pontchartrain, and thence to the Mississippi River below New Orleans (Statutes, p. 10).

Inside of this protection levee were to be dug immense canals—that on the lake shore to be not less than 65 feet wide and 15 feet deep in the middle, with proper slope of sides to serve as a reservoir for drainage of the City of New Orleans and the lands

in the rear of the city, from which the drainage was to be pumped into the lake. The dimensions of the other canals just inside and adjoining said protection levees were to be of the character fixed by said Board of Administrators. (Statutes, p. 10.)

The protection levees were to be built with the earth removed from said canals, that on the lake shore front was to be of not less than 100 feet wide and of sufficient height to protect the city from overflow from Lake Pontchartrain; and those above and below the city were to be of the dimensions determined by said Board of Administrators. (Statutes, p. 10.)

There were to be also various internal canals leading into said reservoir canal.

The location and dimensions of all canals and protection levees, as well as dimensions of large canals, are fully shown on the maps in evidence. (Complainant's maps 1 and 2.)

The territory to be drained, as is shown on Complainant's map No. 1, (page —), covered 26,026 acres.

On the 7th of February, 1872, the City of New Orleans, by Ordinance No. 1,359, established the Fourth Drainage District, and located the lower protection levee. (Record, pp. 111 and 112.)

On the 10th of June, 1872, the City of New Orleans, by Ordinance 1,569, levied an assessment of 2 mills per superficial foot on the lands in the Third Drainage District. (Record, p. 114.)

On the 20th of November, 1872, the City of New Orleans, by Ordinance No. 1,877, levied an assess-

ment of 2 mills per superficial foot on the lands in the Fourth Drainage District. (Record, pp. 114 and 115.)

Proper proceedings were also had in the proper courts, and the lands in said Third and Fourth Draining Districts were decreed to be subject to the first mortgage lien and privilege provided for in said Act of the legislature of 1858 as follows, in the Third Drainage District on the 4th day of May, 1872 (Record, pp. 168 to 170), and in the Fourth Drainage District on the 29th day of January, 1873 (Record, pp. 180 to 182); and thereafter the assessment rolls for said districts were duly approved and homologated, as follows:

In the Third Drainage District on the 8th of November, 1872 (Record, p. 172), and in the Fourth District on the 15th of March, 1873 (Record, pp. 188 and 189.]

The assessment rolls for the nine remaining installments in the First Draining District [from the 2d to the 10th inclusive] were filed in the Seventh District Court on December 7th, 1872; but Judge Collins, of that court, refused to homologate the same, and the matter went to the Supreme Court of Louisiana on appeal, where the judgment of the lower court was reversed [27 Ann., p. 20], and the mandate was filed in the Superior District Court on the 21st of March, 1874. [Record, pp. 119 to 122.]

Some of the assessments in the First and Second Drainage Districts had been collected by the Boards of Commissioners in those districts before the trans-

fer to the City of New Orleans, under Act No. 30 of 1871, to wit: $333,941.62, but no account of how the same was expended by said Commissioners or the city of New Orleans, is shown, (except about $117,600) leaving a balance of $218,903 unaccounted for (Record, pp. 75, 610, 588) though it was the duty of the city of New Orleans to require said Commissioners to account and deliver to said city all monies not accounted for and used by said Commissioners for drainage. (Statutes, pp. 11 and 12.)

The city has presented statements, (Record, p. 420 to 423), with a recapitulation (Record, p. 610), showing the drainage taxes collected in the four districts—those in the First and Second Districts being assessed by the Boards of Commissioners therein, and those in the Third and Fourth Districts being assessed by the City of New Orleans — together with the amounts collected by said Commissioners in said First and Second Districts, and by deducting these amounts we get the balance that came under administration by the City of New Orleans in those districts, and this balance added to the assessments by the city in said Third and Fourth Districts, give the entire amount of drainage assessments that came under the administration of said city, under said Act No. 30 of 1871, as follows :

| | | |
|---|---|---|
| 1st District :—Balance due June 1st, 1871.. The assessment was made by Commissioners, September 12, 1861 (Record, p. 113). Judgment of Homologation for 1st installment of 10 per cent., was rendered March 11, 1863 (Record, p. 118), and on 2nd to 10th installments, March 21, 1874, (Record, pp. 119 to 122). | $ | 500,714 02 |
| 2nd District :—Balance due June, 1874..... Assessment made by Commissioners March 11, 1861 (Record, p. 113). Judgment of Homologation was rendered March 23, 1869 (Record, pp. 147 and 148), and November 11, 1868 (Record, p. 159). | | 289,907 40 |
| 3rd District :—Assessment levied by City June 11, 1872 (Record, p. 114. Judgment of Homologation was rendered November 13, 1872 (Record, p. 172)..... | | 627,598 93 |
| 4th District :—Assessment levied by City November 19, 1872 (Record, pp. 114 and 115). Judgment of Homologation was rendered March 15, 1873 (Record, p. 188) | | 281,416 81 |
| Total ..... | $ | 1,699,637 16 |
| Of which, according to said statement, there was due by the City in all four Drainage Districts (Record, p. 610)..... | | 697,637 28 |
| And by individuals..... | | 1,001,999 88 |
| Total of assessments with the collection of which the City became charged..... | $ | 1,699,637 16 |

Act No. 30 of 1871, became a law without the Governor's signature, was promulgated, March 14, 1871, and required of said Administrators, the immediate undertaking of the duties imposed on them

by said Act. On the very day the law was promulgated, notice was given by the Mississippi and Mexican Gulf Canal Company, to the city, of the desire of that Company to begin the work (Record, p. 338). And the debts for this work — excavations, canals etc., authorized under said Act No. 30 of 1871, was to be paid for solely from the collections of drainage taxes, which were to be placed to the credit of the Mississippi and Mexican Gulf Ship Canal Company, to be used *solely* for this purpose, as above stated.

The City of New Orleans at first refused to accept the duties imposed on it under the Act of the legislature, and the mayor called for an estimate from the city surveyor, of the cost of draining the territory described in the Act of the legislature, and City Surveyor Bell gave a hurried and approximate estimate, fixing the figure at $3,000,000. (Record, pp. 339 and 340.)

At this time, the balance of the drainage taxes that had been levied and were unpaid, in the First and Second Drainage Districts were definitely known, because the records were in existence showing the same. The remaining territory where no taxes had been levied was also definitely known, and the area thereof, and the rate of taxation authorized, which was 2 mills per superficial foot, and hence the city could and did see how much she would have to depend on to complete a work which was estimated to cost $3,000,000.

The result was, that if every cent of drainage tax due and unpaid in the First and Second Drainage Districts, together with all that was authorized in

the Third and Fourth Drainage Districts, was collected in full, the same would amount to $1,696,-637.16, or a little over half of the estimated cost of the work.

The city seeing this condition of things definitely, undertook to provide an additional mode of payment for the costs of excavations, levees, etc.

The first efforts of the city in providing this additional means, is to be found in the extracts from the first ordinances proposed in the council, one of which was introduced by Mr. Shaw, on the 4th day of April, 1871, and reads as follows (Record, pp. 338 and 339):

> "The city will issue warrants for the payment of the work as required by the Act of the legislature, and in case of non realization, or non collection of assets, the same to bear eight per cent. per annum interest; the said warrants to be issued with the understanding to be inscribed, therein, or endorsed thereon, that they shall not be enforcible by suit and judgment, but if not paid in one year out of the proceeds of drainage tax and assets, they shall be funded in bonds of the city, bearing *eight* per cent. interest, payable semi-annually, having ten years to run with due provision for retiring the same, and securing the punctual payment of interest and the gradual extinction of principal. *The City and Company shall agree to apply to the legislature for approval of the issue of said bonds.* The city shall have power to sell said bonds, or give the same in payment of the work contracted for; but no sale or exchange shall be made at a price less than eighty cents on the dollar exclusive of interest, and any holder of a warrant after thirty days notice, if not paid in money may demand bonds for the same, at eighty cents on the dollar."

A similar provision is found in another proposed ordinance introduced by Mr. Walton.

The above proposed ordinances finally resulted in the passage of Ordinance No. 814, Administration Series, which was adopted on the 25th of April, 1871, against the Mayor's veto, the title of which declares it to be: "An ordinance to provide for the more efficient drainage of the City of New Orleans and environs and their protection from inundation." (Record, pp. 340 to 342.)

The preamble thereof recognized that it was the duty of the city to provide for an exclusive system of drainage, lay out the lines and fix the dimensions of certain canals and levees, and in various ways to recognize the claims and accounts, and to make settlements with the Mississippi and Mexican Gulf Canal Company in performing the excavations and building of such canals, and it at the same time claimed that certain portions of the Act of the Legislature put in question its right to the control of its drainage system, and its right to freely contract for the work and agree upon a price for the same and did not recognize the validity or constitutionality of said legislative action in certain of its parts, yet convinced of the importance of an effective drainage system and the desire of the public for its accomplishment without any further delay and satisfied of the capacity and readiness of the company to do the work; ordained:

*Section 1.* That all matters pertaining to drainage should be in charge of the Administrator of Improvements and the Mayor.

*Section 2.* Provides for a standing committee on drainage, composed of Mayor, Administrators of Improvements and Finance, to prepare a plan of work and report same to Council, and on the approval thereof, the Administrator of Improvements was authorized to allow the Mississippi and Mexican Gulf Canal Company to enter on the work under his direction.

*Section 3.* Expressly notified the company that the city did not wave its right freely to contract for the work of excavating the canal and erecting the levees required, with said company or any other party as might thereafter appear, to the best advantage of the city, and that the directing and allowing said company to enter upon and perform any portion of said work laid down, was not to be considered as implying said company's exclusive right to its performance and completion or continuing the same further or otherwise than during the pleasure of the Council, and said Company was further notified that such *work, and none other, as should be performed with the consent of the Council, should be settled for as thereinafter provided;* and then follows four separate provisions showing how said work is to be settled for, viz:

1st. All present canals and levees so far as they might form part of the levees and canals to be constructed were to be measured and certified, and were to be allowed in deduction of measurements of work done and completed.

2d. The work done by the company was to be measured and certified monthly, so far as shaped up, completed and dried, and payments were to be based on measurements made of the work in this condition.

3d. Earth from the canals, not required for levees, should be the property of the city and subject to her disposal.

4th. This provision was in these words:

> "The city will issue warrants for the payment of the work as required by the act of the Legislature, *and in case of non-realization or non-collection of assets provided for therein*, the same to bear eight per cent. per annum interest, the said warrants to be issued with the understanding, to be inscribed therein or indorsed thereon, that they shall not be enforceable by suit and judgment, but if not paid in one year out of the proceeds of the drainage tax and assets they shall be fundable in bonds of the city bearing eight per cent. interest, payable semi-annually, having ten years to run, and with due provision for retiring the same and securing the punctual payment of interest and gradual extinction of the principal.
>
> "The city shall have power to sell said bonds or give them in payment of the work performed; but no sale or exchange shall be made at a price less than eighty cents on the dollar exclusive of interest, and any holder of a fundable warrant, after thirty days' notice, if not paid in money, may demand bonds for the same at eighty cents on the dollar."

5th. Payments, certificates and warrants to be based on and computed according to aforesaid measurements.

*Section 4.* Nothing in said ordinance was to imply that the earth removed from a canal and placed on the bank should be construed into a levee, but such deposit as the aforesaid committee should decide to be necessary for levee purposes should be paid for.

*Section 5.* Reiterates the city's aforesaid notices and reservations.

It was, therefore, to the interest of the company to accept this ordinance, for it provided all the means necessary to complete the entire system of drainage, and they did accept it, by its going to work under Ordinance No. 820 and its amendments (Ordinance No. 1362) which laid out the work to be done and provided as follows :

> "That the Mississippi and Mexican Gulf Ship Canal Company is authorized to commence the following work, subject to the terms and conditions of Ordinance No. 814 Administration Series." (Record p. 343, 345, and 346.)

Its acceptance is further established by the positive evidence of J. O. Noyes, its late president, given in a suit in the late Seventh District Court, and offered in this case, which is to the effect that the company had accepted the terms of said ordinance and were working at the time the evidence was given thereunder. (Record, p. 343.)

And its acceptance is further established by the acceptance by the company of the drainage warrant issued for the work done under said ordinance, with the clause therein that the same should not be en-

forceable by suit and judgment, but should be fundable into bonds of the character in said ordinance described; (Record, pp. 368 to 372,) and it again accepted the terms of said ordinance when it surrendered the above drainage warrants and accepted certificates for the gold bonds in the ordinance provided for. (Record, pp. 370 and 371.) No resolution of the directors, no matter how solemnly passed or elaborately attested, could be more binding on the company as to the terms of Ordinance 814 than these acts.

Of course the provision in this Ordinance 814, providing for the issuance of the city's bonds to pay for excavations represented by drainage warrants, being outside of the provisions of the Act of the legislature, was null unless ratified by the legislature, but subject to such ratification, it was binding on the city and the company. This was well understood, as will be seen by reference to the above extract from said proposed ordinance, wherein it was provided,

> "*The city and the company shall agree to apply to the legislature, for approval* of the issue of bonds." (Record, pp. 338 and 339.)

As we have already seen ordinance 814 was adopted by the council, on the 25th of April, 1871. The next session of the legislature in January, 1872, and on the 26th day of April of that year, said legislature, in part, ratified the provision in the above ordinance, and in unqualified terms, provided for the issuance of bonds, bearing interest at 7 per cent.

instead of 8 per cent. and having 50 years to run instead of 10 years, as provided in said ordinance 814, and rejected the provision, for not enforcing drainage warrants by suit and judgment, and utterly disregarded all the notices and reservations set forth by the city in said ordinance 814; and such ratification related back to the contract provided for in the ordinance at the date thereof, (the 25th of April, 1871,) and became a part and parcel of the Act No. 30 of 1871, with the same force and effect as if the said ratifying section of the Act of the legislature had been written in said Act 30 of 1871.

That ratification and affirmance, is found in the 13th section, of Act No. 73 of 1872, approved April April 26th of that year, which reads as follows: (Statutes pp. 13 to 15.)

> "SEC. 13. Be it further enacted, that for all unbounded debts existing December 31st, 1872, and unpaid at the time of the passage of this Act; or caused by the receipts of certificates of 1871 for the revenues proper of 1872; and for excavations and levees, drainage machinery and revetments, authorized by law or required for the protection of the city from overflow or inundation, the city may issue from time to time, as they may be required, bonds of the denomination of five hundred and one thousand dollars, having fifty years to run, and bearing seven per cent. interest, principal and interest payable in gold, in New York or New Orleans, and at any other point the council may designate; with quarterly coupons, and that the bonds thus issued shall be called the New Consolidated Debt of New Orleans. No bond shall be issued but by authority of the council; nor for a lower rate

than ninety cents on the dollar; all issued for excavations and levees, authorized by Act No. 30, of 1871, or by drainage laws previously enacted, shall be marked "Drainage Series;" and all taxes collected for drainage, and not required for the payment of warrants, shall be devoted to the purchase from the lowest bidder of bonds issued for drainage. No bid shall be accepted above par, and the right is reserved to the council to reject all bids."

The proposition to issue bonds for *excavations*, if the company will not sue on the drainage warrants, was made by the city to the company, accepted by said company, and ratified by the legislature.

There was thus concluded a valid contract between the parties for the payment of the excavations and levees of the drainage system, in bonds of the drainage series, which was in addition to the payment provided in the Act 30, of 1871, in the proceeds of drainage taxes. The cost of the drainage system was a debt of the City of New Orleans to be paid and discharged by the issuance and delivery of the aforesaid bonds, or by the proceeds of drainage taxes, and the city in turn was to be reimbursed her bonds, or to purchase the same, from any excess of drainage taxes that might not be required to pay drainage warrants.

This debt was created when the minds of the parties came together, which was immediately after the date of Ordinance 814, which the company accepted by going to work thereunder on the work provided in Ordinance 820 [for by the above ratification the contract became valid from its adoption], and al-

though the debt was not all due at that time it was nevertheless a debt for the whole cost of drainage, and was to become due from time to time as the work progressed. The act of ratification did not make the debt, but the contract made the year previous created the debt, and the act of the legislature only sanctioned it, and it was a part of that debt, referred to in the title of said Act No. 73, of 1872, which it was obligatory on the City of New Orleans to fund, arrange and provide for.

After the adoption of Ordinance No. 814, in April, 1871, and the consequent provision of all the means necessary to complete the contemplated system of drainage, the work began and was continued under the direction and to the satisfaction of the Engineer in charge until May, 1876, [Record pp. 619 to 629,] and during this time, according to the last and corrected statement furnished by the city 3,929,505 cubic yards of excavation had been done by the Canal Company and Van Norden its assignee [Record pp. 94 and 619), costing, at 50 cents per yard, $1,964,752.79 for which, with a few other matters, drainage warrants to the amount of $1.977,734.59, were issued and delivered [Record pp. 92, 93, and 585 and 586]; and between May, 1872, when the first bond was issued, and December 31, 1874, (when the last bond was issued,) there had been issued and delivered to said company and its assignee, $1,538,761.12 of bonds of the "Drainage Series," provided for in section 13 of the Act 73 of 1872, to pay for excavations and canals represented by $1,-

375,948.25 and $11,903.25 interest thereon, of drainage warrants. The bonds in accordance with the Act of the legislature were issued at ninety cents on the dollar.

During this time there was also paid $23,666.59 of the above drainage warrants in cash, collected from drainage taxes, (Record, pp. 435 and 466,) and these were the only drainage warrants that ever were paid in cash.

During this time drainage warrants to the amount of $215,862.27, (Record 435,) had been sold by Van Norden, to parties owing drainage taxes to pay said taxes with, [Record, p. 630,] because the city was so slothful, [Record, p. 643,] in the collection of said tax.

The differences between the above amounts paid in bonds, in cash and in drainage warrants, ought to be the amount of drainage "Work Warrants" now outstanding. These, together with the "Purchase Warrants," issued on June 6, 1876, amount to $681,-108.62. [Record, pp. 535 to 542.]

The total amount of bonds of the "Drainage Series," issued under the above section of Act 73 of 1872, to pay excavations represented by the aforesaid drainage warrants, and for other purposes connected with drainage, such as wooden revetment to the front of the protection levee on the lake shore front, and land taken for canals &c., was $1,672,105.-21. [Record, pp. 423 to 429.]

On the 7th of June, 1876, the City of New Orleans, pursuant to authority granted her under Act No. 16

of 1876, [Statutes, pp. 15 to 17,] purchased from the Canal Company and Van Norden, transferee, all of its dredge boats, tools, implements for dredging and its franchise and other property, for $320,000, in drainage warrants issued by the city under the above law and payable out of drainage taxes. (Record, pp. 248 to 252.)

Thereafter the City of New Orleans, in addition to the duties and obligations theretofore resting on her, became charged with all the duties and obligations of the Canal Company and its assignee, and bound to complete the drainage work and system.

Prior to said transfer as well and thereafter she neglected her duty and violated her obligations toward the drainage fund in this, that she was negligent and slothful in the collection of the drainage tax; (having collected in principal and interest and attorneys' fees, only $364,596.10 from June, 1871, to October, 1888, (Record, p. 435,) ) misapplied the taxes collected (Record, p. 88), and finally, when charged with the duties formerly imposed on the Canal Company, refused to complete the drainage system (Record, pp. 37 and 80), suffered some of the aforesaid dredge boats, machinery and appliances to sink, rust and rot (Record, pp. 80, 319 and 320), while others were sold (Record, pp. 272 and 273), and thus rendered herself unqualified to complete said system [34 La. A., 175, and Record, p. 80], abandoned the work already done, allowed the canals that had been dug to become well nigh useless [Record, pp. 80, 492 to 495, and 495 to 499,

and 525 to 530], and thus brought about a condition of things under which the courts have declared the drainage tax should not be collected [34 La. A., p. 170, Record, pp. 656, 648, 674 and 677), and in addition to all this she advised the drainage taxpayers, by resolution of the council and by public proclamation in the newspapers, not to pay their taxes [Record, pp. 81 and 321], and advised and counseled with said drainage taxpayers how they could, under the aforesaid jurisprudence of the State, brought about by the Acts of the city herself, avoid all payment of said taxes. [Record, pp. 476 to 479.] And all this was with $681,108 of drainage warrants payable out of drainage taxes, outstanding and unpaid. [Record, pp. 535 to 542.]

These acts, with many acts of misappropriation of funds collected, are set out at length in the bill, which avers the information and belief that there are many more such acts of misappropriation, the dates and amounts of which, complainant is ignorant.

The answer [Record, pp. 22 to 27] sets out all the acts of the legislature, referred to by complainant, disputes the validity of all the drainage tax judgments in the Fourth Drainage District, and further disputes the valitity of all the assessments and judgments against the City of New Orleans, in the First, Second, Third and Fourth Drainage Districts, and avers that if said judgments, against said city, are valid, they have been more than doubly paid by the issue and delivery of the aforesaid bonds of the

"Drainage Series," to take up drainage warrants, and that by such excessive issue of said drainage bonds, the drainage fund became indebted to the City of New Orleans for the difference between the amount of judgments against her and the total sum of said bonds issued and delivered.

The answer also avers strenuous efforts by all lawful means to collect the drainage tax judgments and the application of all sums collected, in the manner pointed out by the law; and it then sets up the Constitutional Amendment going into effect January 1, 1875 [Statutes, pp. 22 and 23], prohibiting the increase of the debt of the City of New Orleans and forbidding the issue of more drainage warrants, unless they were made payable out of drainage taxes and assets; that said Act No. 16, of 1876 [Statutes, pp. 15 and 16], authorizing the purchase by the city was unconstitutional, null and void, and that the city could not, after said date, make herself liable for drainage warrants, either by direct assumption or by failure to carry out and complete the drainage system.

Respondent further contended that if the uncollected drainage taxes had been collected and paid to the holders of drainage warrants, there would have been nothing left to carry on the drainage work, and if, on the other hand, the collections had been made and applied to the continuance of the work, there would have been nothing wherewith to pay drainage warrants, and finally, that if it be true that, through error of officials, any portion of the collections have

been misapplied, then such sums are more than compensated by the over issue of the bonds of the "Drainage Series," already referred to, and that the result of an accounting would show the drainage fund largely indebted to the City of New Orleans.

The case was referred to O. B. Sansom, Esq., one of the standing masters of the court. [Record, p. 29].

The findings of the master on the facts (Record, pp. 73 to 83) and on the law (Record, pp. 83 to 102) are very voluminous, and are substantially in favor of complainant, and show an indebtedness due by the City of New Orleans to the drainage fund, exclusive of interest, of $1,426,235.68, and, inclusive of interest, of $2,795,421.20. (Record, p. 82.)

Forty-five exceptions were filed by the defendant to the above report. The broad language of the Court below (Record, pp. 779 and 780) would seem to sustain all of them, (not excepting those filed by the complainant), and dismisses the bills at complainant's cost.

Fearing that any omission to note the action of the Court on each exception and assign the same as an error, might be construed as an acknowledgement of the correctness of the Courts ruling on any exception not specially noted, we will now proceed to an assignment of errors in detail.

FIRST ERROR.

In the fourth finding of fact (Record, p. 74) the master found that by resolution of the Council of the

City of New Orleans, passed on the 6th day of February, 1872, the Fourth Draining District embracing lands not included in the three former Draining Districts was established, and by proper proceedings said land was declared to be subject to a first lien and privilege for the expense of draining the same, and that thereafter in proper courts assessment rolls were filed, and after due proceedings had, the same were homologated on January 30, 1873, and judgment rendered against the lands assessed and the owners thereof.

To this finding the defendant excepted (Record, p. 95, 1st and 2d exceptions) and contended that said Fourth Draining District was never legally created and never had any legal existence, and that no legal and valid assessment was ever imposed in said District.

The ruling of the Court sustaining said exceptions was an error.

SECOND ERROR.

In the sixth finding of fact (Record, p. 75) the master found that, by Act 30 of the Legislature of the year 1871, the State abolished the Boards of Draining Commissioners and subrogated the defendant to all of the rights and powers and cast all the duties and obligations of said Boards on the defendant, and among them was the duty, "that the said board" (meaning here the Board of Administrators of New Orleans) "shall collect the assessments herein autho-"rized in time to provide for the payment of the

"warrants to be issued to said Company at the date "of their issuance."

To this finding the defendant excepted [Record, pp. 95 and 96, 3d exception], and alleged that the City of New Orleans was not legally vested with the power granted to the Boards of Draining Commissioners by Act No. 57, of 1861, to enforce collections of drainage assesments by the summary proceedings provided in that act, and that consequently all the proceedings of the city, on the assumption that it possessed such power, were illegal, null and void.

The ruling of the court sustaining such an exception was an error.

THIRD ERROR.

In the ninth finding [Record, pp. 76 and 77] the master found that in pursuance of the powers granted the Board of Administrators of the City of New Orleans by said Act 30, of 1871, said board, on the 27th of April, 1871, adopted an ordinance [No. 814, A. S., Record, pp. 340 to 342], providing the mode and manner of excavating canals and building levees, and the terms and mode of payment by delivering drainage warrants therefor, and in default of their payment by collections from drainage taxes, that then the City of New Orleans would issue and deliver its bonds in payment thereof.

Defendant excepted to said finding [Record, p. 96, 4th exception], and to the fifth finding of said master made under request of defendant [Record, p. 89] to the effect that said Ordinance No. 814 was valid

in law so far as it did not contravene Act 30, of 1871, and contended that said ordinance was and is repugnant to said act No. 30, of 1871, and was and is illegal, null and void.

The ruling of the court sustaining such exception was an error.

FOURTH ERROR.

In his tenth finding [Record, pp. 77 and 78], the master found that, in pursuance of said Act No. 30, of 1871, and said ordinance No. 814, A. S., the Mississippi and Mexican Gulf Ship Canal Company entered upon the work of draining by said statute and ordinance provided for.

To this finding the defendant excepted [Record p. 96, 5th exception], and alleges there is no proof that said company ever accepted the provisions of said ordinance 814, and that said company had no power under its charter to accept the provisions of said ordinance.

The ruling of the court sustaining such exception was an error.

(Note.—The sixth exception of defendant [Record, p. 96], as to the tenth finding [Record, pp. 77 and 78), of the master (which the exception wrongfully numbers 8th], to the effect that the amount of work done by the Canal Company and measured and accepted by the City of New Orleans amounted to $2,243,514.78 is well taken, and was useless, as the master corrected this finding [Record, p. 94], on the day of filing his report [April 23, 1889, Record, p. 49], and on the evidence for the first time produced

by the city on that day, and found the amount to be $1,964,752,80.)

FIFTH ERROR.

The master, in his tenth finding of facts [Record, pp. 77 and 78], further found that at the time the Canal Company was superseded by the City of New Orleans [said city having obtained the authority and exclusive right from the State under Act No. 16, of 1876.] Almost three-fourths of the work required for the drainage of the lands embraced in the four draining districts had been performed.

The defendant excepted to this finding [Record, p. 96, 7th exception] [which he incorrectly states as the 8th finding, but means the 10th], and contends that the evidence of Bell himself, and the claim of the plaintiff, as well as the other evidence, shows that a far smaller proportion of the drainage work had then [June, 1876], been done.

The ruling of the court sustaining such exception was an error.

SIXTH ERROR.

In the eleventh finding of fact, the master found [Record, p. 78] that, as the drainage work progressed, the City Surveyor measured and certified the number of cubic yards of work done by the Canal Company, and found the amount due said company, and that these certificates, commencing July 1, 1871, were presented to the Administrator of Accounts, who delivered, to the Canal Company, drainage warrants on the Administrator of Finance,

at the price stipulated in the act of the legislature, and said warrants were presented from time to time to the Administrator of Finance, who paid them by exchanging for them, gold bonds of the City of New Orleans, "Drainage Series," to the amount of $1,538,764.12, the drainage warrants surrendered for said bonds being $1,375,984.25 in principal, and $11,903.33 in interest, making a total of $1,387,887.58; said bonds being delivered at 90 cents on each dollar. All of said bonds were issued after the passage of Act No. 73, of 1872, and none before the 10th of May, 1872; and that at the several times the said drainage warrants were exchanged for gold bonds, no intention was manifested by the City of New Orleans, nor any financial agent thereof, to treat said bonds as payment of the judgments then outstanding against the City of New Orleans for assessments levied against the streets, public places and private property owned or held by the City of New Orleans, but it was the intention of the City of New Orleans to pay for the work which had been performed by the said Mississippi and Mexican Gulf Ship Canal Company; and in response to an inquiry made by defendant (22d finding, Record, p. 91), the master further found, that the defendant had given no evidence tending to show that any of the bonds of the "Drainage Series" were delivered as payment of assessments for drainage taxes levied against the City of New Orleans, the cities of Jefferson and Carrollton; that the statutes uniting said cities of Jefferson and Carrollton with

the City of New Orleans, expressly declared (see Statutes, pp. 19 to 22) that the City of New Orleans, as consolidated, should be liable for the debts existing against said cities, and the master was entirely satisfied that when the bonds of the City of New Orleans were delivered from time to time to Van Norden, as assignee of the Canal Company, they were intended, by the City of New Orleans, as payment of the money demanded of said city for the work performed by said Canal Company.

The defendant excepted to said eleventh finding (8th exception, Record, p. 96), to the effect that said city did not manifest any intention to treat the bonds issued by her, in exchange for drainage warrants, as payment of the judgments against her for drainage assessments, and further excepted (39th exception, Record, p. 101) to said twenty-second finding (Record, p. 91), and contended there was no evidence to support such finding.

The ruling of the court sustaining such exception was an error.

SEVENTH ERROR.

In the twelfth finding of fact (Record, p. 79), said master, among other things, found that the City of New Orleans, under authority of the legislature, on the 7th day of June, 1876, purchased from the Canal Company and Van Norden all of its property [mentioning it] for the sum of $300,000, in drainage warrants.

To this finding the defendant excepted [Record,

p. 96, 9th exception], in so far as said finding implied, that $300,000 of drainage warrants, issued to Van Norden on June 7, 1876, were for machinery and other property then transferred by him to the city, and contended that only one-half of such sum was issued for said property and the other half was issued in satisfaction of claims of Van Norden against the city for damages.

The ruling of the court sustaining such exception was an error.

EIGHTH ERROR.

In the fourteenth finding of fact (Record, p. 80), the master, among other things, found that, after the transfer from the Canal Company and Van Norden, transferee of said company, to the city of New Orleans, in June, 1876, said city allowed all the canals which had been dug and used for draining the land in said four draining districts to fill up and become of no use, and said city cut or allowed the levees in one or more places to be cut, and neglected to continue the draining of the said lands, and abandoned the draining thereof completely, and allowed all of the work that had been done in the way of drainage to become of no value, and that all of the dredge boats, tools, implements purchased from said Canal Company, and were allowed to rust, decay, and become worthless, and a large part of the lands which had been drained were inundated and overflowed in consequence of the neglect and disregard of said city of New Orleans, and said master, in response to a request made by

defendant, in substance reiterated said finding in his 26th, 28th and 29th findings. (Record, p. 92.)

To these findings defendant excepted (Record, p. 97, 10th exception), and contended there was no evidence showing said works were entirely filled up and had become of no use, and further, that the evidence showed that the inundations and overflows complained of were due to other causes, viz: incoming water from Lake Pontchartrain, and in his (40th exception, Record, p. 101), contended said inundation was caused by the cutting of the Metairie Ridge, for the original canals contemplated by Bell's plan, and in his (41st exception, Record, p. 101,) that there was no evidence whatever in support of said twenty-ninth finding, to the effect that all the lands drained up to June 7th, 1876, were at the time of said finding, [April, 1889,] undrained, because of defendant's neglect to have the canals cleaned and proper machines kept in condition for the use of draining said lands.

The ruling of the court sustaining said exception was an error.

NINTH ERROR.

In the fifteenth finding of fact [Record, p. 80], the master found that the system of drainage, as devised by the late W. H. Bell, City Surveyor, would have accomplished the purposes for which it was designed, if it had been continued and carried out *bona fide* by the City of New Orleans, under the powers expressly granted to her, and the lands would have been drained and all overflows prevented, and all of said lands would have been of great value and the assess-

ments levied against said lands could and would have been in almost every instance collected, and in response to a request made by defendant, (14th finding for defendant, Record, p. 91,) in substance repeated said finding.

The defendant excepted to said findings [11th exception, Record, p. 97), and contended that it was shown that said system, if completed, would not have completed the drainage of said lands unless numerous additional interior canals had also been constructed, and repeated said contention in his (37th exception, Record, p. 100).

The ruling of the court sustaining said exception was an error.

TENTH ERROR.

The master, in his sixteenth finding of fact (Record, p. 80), found that the City of New Orleans procured from the State:

1st. An amendment to the State Constitution forbidding any increase of the municipal debt after January 1, 1875.

2nd. The right to absorb by purchase all the franchises, powers, privileges and property of the Canal Company.

3rd. The exclusive right to complete the drainage of all the lands to be drained.

4th. The exclusive right to excavate all canals and build all levees requisite to the completion of the drainage system, and entered into possession of all the property of said Canal Company.

To this finding the defendant excepted (Record, p. 97, 12th exception), and contended there was no evidence to sustain such finding.

The ruling of the court sustaining such exception was an error.

ELEVENTH ERROR.

The master, in said sixteenth finding (Record, pp. 81 and 82), further found that the council of the City of New Orleans, by divers proclamations addressed to owners of lands taxed, advised and directed and counseled with said owners not to pay the moneys assessed for drainage taxes, and, further, that the City of New Orleans made no *bona fide* efforts to collect said drainage taxes other than providing an office in the City Hall, where persons might pay said drainage taxes, and the same was repeated in the 32nd finding (Record, p. 93) made in response to a request presented for special findings.

To these findings defendant excepted (13th and 14th exceptions, Record, p. 97), and contended the evidence showed only one proclamation issued in the above sense, and that the city had used all the diligence possible in endeavoring to collect said taxes.

The ruling of the court sustaining said exception was an error.

TWELFTH ERROR.

The master, in his seventeenth finding of fact (Record, p. 81), found that defendant neglected to preserve the canals and levees on which over $2,000,000 had been expended in any condition of use-

guished drainage warrants of the face value of $1,375,948.25, and that in consequence of such issue of gold bonds the assessments aforesaid were extinguished, and the city of New Oaleans became entitled to a credit against the drainage fund of, at the smallest computation $678,147.95, and that the finding of said master was erroneous in not stating that the assessments aforesaid were thus extinguished, and that the city of New Orleans, as trustee of the drainage assessments, was entitled to said credit, and that said account was also erroneous in not giving the city of New Orleans credit for the sum of $52,-006.65, the expenses incurred by said city as trustee, subsequent to 1876, in its efforts to collect drainage assessments, and that if the accounts were correctly stated, it would show that the drainage assessments against the city of New Orleans and the cities of Jefferson and Carrollton were paid and extinguished, and that the balance due against other assessees and debtors of drainage assessments would be only $728,399.63.

The ruling of the court sustaining such exception was an error.

FOURTEENTH ERROR.

In the nineteenth finding of fact (Record, p. 82), the master found the defendant had collected the following assessments:

| | | | | | | |
|---|---|---|---|---|---|---|
| 1st | Drainage | Dist. | from | 1871 to 1876.. | $72,296 48 | |
| " | " | " | " | 1876 to 1888.. | 18,415.42 | |
| 2nd | " | " | " | 1871 to 1876.. | 25,014.65 | |
| " | " | " | " | 1876 to 1888.. | 17,610.65 | |
| 3rd | " | " | " | 1871 to 1876.. | 69,974.30 | |
| " | " | " | " | 1876 to 1888.. | 30,144.35 | |
| 4th | " | " | " | 1873 to 1876.. | 21,956.70 | |
| " | " | " | " | 1876 to 1888.. | 17,989.30 | |
| | | | | | $273,401.95 | |
| Add interest and attorney's fees..... | | | | | 91,194.75 | |
| | | | | | | $364,596.60 |
| Paid cash for warrants..... | | | | | | 23,665.59 |
| | | | | | | $340,931.01 |

And that this balance was to be accounted for.

To this finding the defendant excepted (Record, p. 98, 17th exception) and contended, that of said above sum, a part, to wit, $203,241.95, was paid in drainage warrants, and that such was a proper mode of paying drainage assessments, and that the balance of said sum was fully accounted for by the defendant in the exhibit filed by showing the amount of its receipts, collections and disbursements for the drainage fund.

The ruling of the court sustaining such exception was an error.

FIFTEENTH ERROR.

In the third finding of law, (Record, p. 83) the master declared that Ordinance 814, of the city of New Orleans, adopted April 21st, 1871, prescribing the mode and manner of excavating canals and building levees, and prescribing the terms and mode of paying for the work by delivery of defendant's

bonds in payment thereof was an undertaking by defendant with the Canal Company, to pay money for the work from time to time as it should be performed and measured, unless no money were received by defendant for drainage taxes, and that as soon as the State authorized defendant to issue the bonds in said ordinance mentioned as payment for the work, the said statute and the authority granted therein related back to the enacting of said ordinance, and said ordinance became and was ratified and confirmed by legislative will; and so soon as the Canal Company entered upon the work mentioned in said ordinance to-wit: excavating the canals and building the levees mentioned, said ordinance became a completed contract between the defendant and the Canal Company; and by that contract the said Canal Company became bound to excavate all canals and build all levees, required to drain the land mentioned, and the defendant also became bound to pay for all the aforesaid work according to the terms stated in said ordinance.

To this finding of law the defendant excepted (18th exception, Record, p. 98), as follows: "The defendant excepts to the master's, 3rd finding of law * * * * to the effect that the above mentioned Ordinance 814, imported a contract between the city of New Orleans and the Mississippi and Mexican Gulf Ship Canal Company, whereby the city bound itself to pay for the drainage work, if the said was not paid for by the collections of drainage assessments; and to the further providing that such pretended con-

tract was ratified and confirmed by the Legislature by Act. 73 of 1872, and thereby became a completed contract, whereby the said Mississippi and Mexican Gulf Ship Canal Company became bound to excavate all canals and build all levees, required to drain the lands mentioned, and the defendant became bound to pay for all the work mentioned according to the terms stated in said ordinance; the fact being that said ordinance was a mere proposition to pay for the work as the city itself should designate, and being to that extent illegal, null and void, and never was ratified or confirmed by the Legislature to any extent whatever, said ordinance did not purport to tender a contract, and the said Act No. 73 of 1872, made no reference whatever to any ordinance, and there was no consideration for any contract as supposed by the master to have resulted from said ordinance and from said Act No. 73 of 1872."

The ruling of the Court sustaining such exception was an error.

SIXTEENTH ERROR.

The master, in his 5th and 6th finding of law, (Record, pp. 83 and 84), found, that the defendant being subrogated by the State to all the rights, privileges, franchises and powers of the Canal Company, it accepted the same burthened with and subject to all the obligations and duties resting on the Canal Company, because the law would not allow two or more corporations to make any contract or adopt any scheme, the effect of which was to allow one of

them to evade obligations or duties in which third parties or the public generally have required vested rights, and that the holder of drainage warrants mentioned in the bill of complaint acquired vested rights in the drainage of the lands and the drainage taxes assessed against said lands, which rights could not be impaired directly or indirectly by statutes of the State or by defendant's neglect of duty nor by its disregard of the contract with the Canal Company, and that the defendant was bound by law to excavate all canals and build all levees, to complete and perfect the drainage of the lands mentioned *bona fide*, and was further bound to collect all assessments, and provide money to pay all drainage warrants drawn against said drainage fund, including the purchase drainage warrants delivered on the 7th of June, 1876.

To the above finding the defendant excepted, (19th exception, Record, pp. 98 and 99), and contended that the city of New Orleans, under act No. 16, of 1876, and the transfer thereunder to the said city, could never assume such an obligation without increasing its indebtedness in violation of the Constitutional Amendment of 1874, then in force, and that no such obligation was intended or imposed by said Act No. 16, or by said transfer.

The ruling of the court sustaining such exception was an error.

SEVENTEENTH ERROR.

The master, in the 7th finding of law, (Record, p. 84) declared that the defendant having neglected to

preserve and keep the canals and levees excavated and constructed in condition fit and suitable for the purposes and uses in which they were designed, and having abandoned the whole scheme of drainage, the law presumes it understood the consequences of such neglect and abandonment, and the law charges said defendant with all the loss and damages resulting from such consequences, and it having been proved in the cause that innundation and overflow upon the lands drained, as well as those to be drained, were the natural consequences of defendant's neglect and abandonment, and that as a consequence the value of the land assessed were greatly reduced, and as a further consequence the owners thereof resisted the collection of said drainage taxes and prevented the collection of a large amount of the outstanding taxes, the defendant cannot now urge the non-payment of said taxes as a reason for having no money to the credit of the drainage fund.

To this finding the defendant excepted (20th exception, Record, p. 99,) the defendant excepted and alleged that the lands had no value and never would have had any value unless drained.

The ruling of the court sustaining such exception was an error.

EIGHTEENTH ERROR.

The master, in the eighth finding of law, (Record, pp. 84 and 85,) found that defendant was vested with the sole power of collecting drainage taxes, and having expressly contracted with the Canal Company not to impede, but to aid, facilitate and press the

collection of said drainage taxes, and it having been proved that, by proclamation directed by defendant to the owners of lands on which drainage taxes were imposed, and that said defendant advised and counseled with said owners not to pay said taxes, the law regards defendant's conduct in that respect as a fraud committed upon the rights of holders of drainage warrants, and therefore defendant cannot urge nonpayment of drainage taxes when called to account for them.

To the foregoing defendant excepted (21st exception, Record, p. 99), but assigned no ground of exception.

The ruling of the court sustaining such exception was an error.

NINETEENTH ERROR.

The master, in the ninth finding of law (Record, p. 85), found that defendant was bound in law to account and pay into said drainage fund the several sums of money assessed against said defendant's streets, public buildings, public places and all other lands, the titles to which were in said defendant, and that it having been proved in the cause that said lands, so held and owned by the defendant, were assessed for draining purposes, and that divers taxes were levied against them, and the said defendant, as owner thereof, and it being further proved that the divers judgments for said drainage taxes, so assessed against defendant, were rendered by courts having jurisdiction thereof, and that said judgments were rendered upon petitions made by

the said several Boards of Draining Commissioners and by the city herself, and that judgments upon petition by the City of New Orleans were revived and are in full force and effect, the defendant must prove that said judgments have been paid and satisfied; and said master further found in his tenth finding of law (Record, p. 85) that the defendant, in delivering its bonds to the Canal Company, in exchange for drainage warrants, cannot set off said bonds in satisfaction of said judgments, because, in delivering said bonds, the defendant construed the thirteenth section of Act No. 73, of 1872, approved April 26, 1872, as directing and authorizing the defendant to make and deliver said bonds in payment of excavations and levees, drainage machinery and revetments, authorized by law and required for the protection of said City of New Orleans, from overflow and inundation, and it having been proved that said bonds were delivered for the aforesaid purpose only, the master declared that said construction was the true and lawful construction of said statute, and that the defendant must account with the drainage fund for said judgments, and interest thereon, from the respective dates, that said judgments were rendered, and the said drainage fund must be credited with the several amounts of said judgments and interest, as the law directs, as is done in the account filed with his said report and made a part thereof. (See Record, p. 81.)

To the aforesaid findings the defendants excepted, (22d exception, Record, p. 99,) because said findings

make the assessments against the City of New Orleans dependent on the intention of the officials of said city in issuing the bonds, and not dependent upon the true and legal construction of Act No. 73 of 1872 and other drainage acts — the city's liability being in fact determined by the law and not by the opinions or intentions of its officials in executing the law.

The ruling of the court sustaining said exceptions was an error.

TWENTIETH ERROR.

The master, in his eleventh finding of law, (Record, p. 85,) further found that the delivery of the drainage warrants and expressly agreeing to pay them out of drainage taxes was an undertaking to pay all persons receiving them, that they should be paid out of drainage taxes, and was also a representation that the drainage taxes should be collected in a reasonable time, and said master further found, by his twelfth finding of law, (Record, p. 85,) that the fact that said warrants were payable from drainage taxes, implies a contract on the part of the defendant that there shall be drainage taxes to pay them, and therefore that drainage taxes should be collected, and applied to their payment, and that if there were no drainage taxes or if none were collectable, defendants were guilty of an inexcusable fraud in issuing them, and that persons who received them had the right to presume the defendant was acting in good faith, and that defendant being now called upon, should not be permitted to jump behind an amendment to the

State Constitution and say: "We cannot pay because we are forbidden to increase our municipal debt," and that no system of jurisprudence among civilized people would permit it; that the law was above amendments to the constitution, and commands municipal corporations to respond in damages for their tortious and fraudulent doings, and that any constitutional amendment which attempted to screen persons or corporations from responding in damages for torts and frauds was void.

To the foregoing findings defendant excepted (23d exception, Record, p. 99), and contended that the drainage warrants were not such an undertaking, and that they were subject to the constitutional amendment of 1874, (Statutes, pp. 22 and 23.)

The ruling of the court sustaining such exception was an error.

TWENTY-FIRST ERROR.

The master, in his thirteenth finding of law (Record, p. 86), found that the amount of drainage taxes uncollected, as aforesaid, with 10% for attorneys' fees, on the same, and interest thereon for sixteen years past at 6% per annum, was, in law, a fund which ought to be in the possession of the defendant to the credit of drainage taxes, to be used in the payment of drainage warrants, and that all persons who should intervene in the present cause are entitled to a decree, and judgment, against that fund, and the defendant *pro rata*, as the said fund should bear to the whole amount of drainage warrants.

To the foregoing finding the city accepted (24th exception, Record, p. 99), and contended that the city had used due dilligence to collect all assessments other than those imposed on herself, and that the assessments due by herself have been long since more than paid and compensated, so that the drainage fund was really indebted to the city, and not the city to the drainage fund, and said master should so have found.

The ruling of the court sustaining said exception was an error.

TWENTY-SECOND ERROR.

The master further found, in response to a request by complainant (Record, p. 85, finding 1st), that at the time Act No. 16, of 1876, became a law on the 24th of February, 1876, the defendant possessed power to provide money by taxing all the assessable property within its jurisdiction to pay for the completing and protecting the drainage of all the lands mentioned, and (Record, p. 86, 2d finding), further specially found that before and at the time of the sale and transfer from the Canal Company and Van Norden to the City of New Orleans, the only limit placed by statute on said city's taxing power was found in section 15, of Act 73, of 1872, and was that it should not in any one year exceed 1¼% upon the assessed value of said city's real, personal and mixed property, "for current city expenses, including police, and exclusive of interest and schools"; and further found, in response to a request of complainant (3d finding, Record, p. 87), the assessed value of said city's real,

personal and mixed property, from 1876 to 1886, both inclusive, with the rate of taxation during each of said years (giving the amounts for each year), and showed that the above limit was far from being reached during those years, and that the use of said unused power of taxation (12th finding in response to a request of defendant, Record, p. 99), on said assessed value from 1876 to 1880, both inclusive, would have given $1,500,000, and that the expenses and costs necessary to complete the drainage system by the City of New Orleans (9th special finding, made in response to request of complainant, Record, p. 88), after said sale and transfer from the Canal Company and Van Norden, after June 7, 1876, pursuant to Act No. 16, of 1876, was in law a part of the current expenses of the City of New Orleans, and that the completing of the drainage of said City of New Orleans (38th finding, Record, pp. 93 and 94), was a duty cast upon said city by prior legislation, no subsequent statute nor constitutional amendment could impair the city's rights to provide funds to pay current expenses and for police purposes up to the rate mentioned; that holders of drainage warrants acquired vested rights under that statute, and any subsequent legislation or constitutional amendment impairing such vested rights were void in law.

The defendant excepted to the above findings (25th exception, Record, p. 99), and contended that the limit of taxation applicable to the City of New Orleans that might result from the transfer to it by Warner Van Norden, transferee of the Canal Com-

pany, of June 7, 1876, is found not in Act 73, of 1872, but in Act 33, of 1876 (Statutes, pp. 31 and 32), and that Warner Van Norden and the drainage warrant holders, under said transfer of 1876, acquired no vested rights to the rate of taxation fixed by Act No. 73, of 1872, and that the completion of the drainage system (30th exception, Record, p. 100), after the transfer by Van Norden and the Canal Company, in June, 1876, was not a part of the current expenses of said City of New Orleans.

The ruling of the court sustaining said exceptions was an error.

TWENTY-THIRD ERROR.

The master further found, in response to a request by complainant (5th finding, Record, p. 87), that all drainage warrants, issued for work done in excavating canals and building levees, prior to June 7, 1876, and unpaid on that day, had been transferred before said 7th day of June, 1876, by said Warner Van Norden.

To this finding the defendant excepted (27th exception, Record, pp. 99 and 100), and contended the above finding was not the fact.

The ruling of the court sustaining said exception was an error.

TWENTY-FOURTH ERROR.

The master further found, in response to a request of the complainant (6th finding, Record, p. 87), that the drainage taxes, levied against the property of the succession of Davidson, amounted to $43,867.97,

with 6% interest per annum, from December 9, 1871, and that said taxes and interest were erased by judgment of the courts of Louisiana, on the ground that the City of New Orleans had abandoned the work and system of drainage, and because the lands assessed had received no benefit from said drainage work, and that since the rendition of the above judgment, no drainage tax judgments had been enforced in the courts, and that at said time, the institution of said suit (15th special finding, Record, p. 88), said Davidson succession was solvent, and able to pay the aforesaid sum and interest so erased, as aforesaid, and the same could have been collected, if the defendant had, in good faith, carried out the work of draining said lands.

To the above finding defendant excepted (28th exception, Record, p. 100), on the ground that said finding erroneously stated the grounds of the judgment in the above matter.

The ruling of the court sustaining said exception was an error.

TWENTY-FIFTH ERROR.

The master further found, in response to a request of complainant (8th finding, Record, p. 88), that the contract of sale the Canal Company and W. Van Norden, transferee, made with the city of New Orleans, on June 7, 1876, could not effect the rights of persons who then held outstanding warrants, and that, therefore, all charges for salaries of Guthrie & Mayo (provided for in said contract) and salaries of City

Surveyors could not be allowed as credits against the drainage fund.

The defendant excepted to said finding (29th exception, Record, p. 100), and contended the city was entitled to said expenses, as trustee, as well as under the stipulations of the act of transfer of June 7, 1876.

The ruling of the court sustaining said exception was an error.

TWENTY-SIXTH ERROR.

The master further found, in response to a request of complainant (10th finding, Record, p. 88), that the charges made against the drainage fund, amounting to $44,118.27, as payments for "old drainage account," were not chargeable against that fund, and were to be accounted for by the city, because the charges comprising said sum are for things and work defendant was bound to do, under express terms of the statute, in order to enable the Canal Company to proceed with its work, under the sixth section of Act 30, of 1871, and further found (11th finding, in response to request of complainant, Record, p. 88), that a charge of $18,971 embraced in the above item of $44,118.27, and charged against the drainage fund as so much cash paid Roselius & Phillips for attorney's fees, was never paid in cash, but was paid in consolidated gold bonds, general series, as was also $4,444.44, paid Judge Walker, and further found (12th finding, in response to request of complainant, Record, p. 88), that various other sums charged against the drainage fund, as paid several City At-

torneys, to-wit: Geo. S. Lacy, in the First Draining District, $6,484.23; also payments to several City Attorneys in the Third Draining District, $5,493.20; also $4,243.50, made to said Geo. S. Lacey, City Attorney in the Fourth Draining District, were improperly paid and were not entitled to be charged against the drainage fund, and that there is still a balance of $4,392 (13th finding, made in response to request of complainant, Record, p. 88), to the credit of attorneys' fees in said Third Draining District for which the defendant must account.

The defendant excepted to said findings (31st exception, Record, p. 100), and contended the same were a part of the city's expenses in collecting drainage assessments, and she was entitled to be credited therewith.

The ruling of the court sustaining said exception was an error.

TWENTY-SEVENTH ERROR.

The master, in response to a request made by complainant (14th finding, Record, p. 88), found that on May 15, 1883, the Common Council of the City of New Orleans directed a committee to examine into and report what drainage taxes, then outstanding, could be collected, and that said committee reported that at that date the sum of $120,000 of the drainage taxes, then outstanding, might be collected.

To this finding defendant excepted (32d exception, Record, p. 100), and contended said report was a mere conjectural and approximate estimate of

the then collectable outstanding drainage assessments.

The ruling of the court sustaining said exception was an error.

TWENTY EIGHTH ERROR.

The master, in response to a request of defendant (7th finding, Record, p. 89), found that Act No. 73, of 1872, enlarged the indebtedness of the City of New Orleans, so far as said city was required to issue bonds to pay for excavations, levees, canal revetments and other things required in the drainage of New Orleans, and in preventing overflow and inundation.

To the said finding the defendant excepted (33d exception, Record, p. 100), and contended that said act did not and could not, in any manner or for any purpose, enlarge the city's indebtedness, as it then existed.

The ruling of the court sustaining said exception was an error.

TWENTY-NINTH ERROR.

The master, in response to a request by defendant, found (13th finding, Record, pp. 90 and 91), that the most reliable testimony on the subject of the cost of completing the drainage system, was that of the late W. H. Bell, who placed the whole amount needed at $3,000,000, and that said testimony (this estimate) was verified by the work done up to the time the City of New Orleans abandoned the same, and said master, therefore, adopted the testimony of

said Bell, and disregarded that of Major Harrod, because his estimates were not founded on a basis satisfactory to said master, and (15th finding, Record, p. 91), that the reliable evidence in said cause as to the costs of completing said drainage system, after the transfer from the Canal Company, to the City of New Orleans, was also that of said Bell.

Defendant (36th exception, Record, p. 100), excepted to the foregoing finding, because, as said defendant contended said master had rejected the testimony of a competent surveyor and engineer.

The ruling of the court sustaining such exception was an error.

THIRTIETH ERROR.

The master, in response to a request made by the defendant, found (26th finding, Record, p. 92), that the inundation of lands in the lower part of the City of New Orleans, south of the Metairie Ridge, was caused by the defendant's neglecting to complete the drainage system as set forth in the plans of the late W. H. Bell.

To this finding the defendant excepted (40th exception, Record, p. 101), and alleged that the evidence showed said inundation was caused by the cutting of the Metairie Ridge, for the canals contemplated by the Bell system.

The ruling of the court sustaining said exception was an error.

THIRTY-FIRST ERROR.

The action of the court, in failing to find the City

of New Orleans indebted to the drainage fund in an amount exceeding all drainage warrants outstanding, with 8% interest due thereon, say $1,500,000, and upwards, and in dismissing complainant's bill, with cost, was an error.

There were numerous other exceptions to the findings of the master, but as the objections raised thereby are already noticed, it would be useless to pursue them further.

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## STATEMENT OF THE CASE IN NO. 780.

No. 780 is a suit at law, brought against the City of New Orleans on two drainage warrants of $2,000 each, with interest at 8% per annum on one of them from October 21st, 1875, and on the other from October 26, 1875, wherein judgment is prayed against said City of New Orleans, payable in cash or in the 7% gold bonds of the "Drainage Series," provided for in section 13, of said Act No. 73, of 1872, (Record, pp. 1 to 5), and this on the ground that the above ordinance 814, as ratified by the legislature of the State (said section 13, of said Act 73, of 1872), together with said Act No. 30, of 1871, constituted a contract between the Canal Company and the City of New Orleans, which provided the means in drainage taxes and bonds for the payment of the cost of an entire system of drainage, which could not be impaired by the amendment to the Constitution of the State, going into effect on January 1st, 1875,

whereby the City of New Orleans was prohibited from, in any manner, increasing her debt.

The drainage warrants sued on are dated, and were issued and delivered for drainage work done after January, 1875, but they were issued and delivered for work done, under a contract made three years prior, and this contract embraced payment for the work of an entire and completed system of drainage, and hence it embraced the work for which the drainage warrants in suit were given.

The defence was an exception of no cause of action (Record, pp. 28 and 29), and the judgment below sustained this exception and dismissed the suit with costs.

Plaintiff brought the case to this court on a writ of error, and now assigns for error, as follows:

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ASSIGNMENT OF ERRORS IN NO. 780.

First Error—The judgment of the court holding that Ordinance No. 814, adopted by the Council of the City of New Orleans on the 24th day of April, 1871, as ratified by section 13, of Act No. 73, of 1872, did not, with Act No. 30, of 1871, constitute a contract that provided means to pay the cost of the entire system of drainage contemplated in said Act No. 30, of 1871, and drainage laws previously enacted, including the warrants sued on, which could not be impaired by the constitutional amendment of the State of Louisiana, going into effect on January 1st, 1875, was error.

Second Error—The judgment of the court dismissing plaintiff's suit, and not adjudging in accordance with the prayer of his petition, was error.

The foregoing errors in both cases, for the purpose of the argument, may be grouped as follows:

In suit No. 1234:

1st. There was error in the courts doubting the legality and binding force of the judgments rendered against the City of New Orleans, based on assessments on her streets, squares, parks and private property in the four drainage districts.

2nd. There was error in holding that said judgments, if legal and valid, had been paid and over paid by the issue and delivery of 7% Gold Bonds, Drainage Series, issued under Section 13 of Act 73 of 1872, and delivered to the Canal Company and Van Norden, transferee thereof, and that by such alleged over payment the city had become a creditor of the drainage fund for a very large amount.

3rd. There was error in the court's holding that the administration of the city of New Orleans of the drainage affairs imposed on her, under Act 30 of 1871, and Act 16 of 1876, had been judicious and proper and had not resulted in waste, damage and destruction to the drainage fund.

4th. There was error in holding there had been no misappropriation of the drainage funds collected, except an item of $14,000 of attorney's fees, and that that item was more than compensated by the issue and delivery of the aforesaid Gold Bonds to Warner

Van Norden, transferee of the Canal Company, between May 10, 1872, and December 31, 1874.

In No. 780:

5th. There was error in the judgment of the court holding that Ordinance 814 (Record, p. 7), adopted April 24th, 1871, as ratified by Section 13 of Act No. 73 of 1872, did not, with Act No. 30 of 1871, constitute a contract that provided means to pay the cost of the entire system, contemplated in said Act No. 30 of 1871 and drainage laws previously enacted, which could not be impaired by the constitutional amendment of the State going into effect on January 1, 1875, and that plaintiff was not entitled to recover judgment payable in 7% Gold Bonds, Drainage Series, of the city of New Orleans.

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## ARGUMENT.

### I.

There was error in the courts doubting the legality and validity of the judgments against the City of New Orleans, amounting to $697,637.28, based on assessments on her public streets, squares and private property.

At the outset it will be observed there is no question raised here as to the enforcement of a lien, foreclosure of a mortgage or a sale of property. The suit is one for an accounting, and the sole question under it is one of debt or no debt. In other words, do the judgments in question establish an indebtedness on the part of the city to the drainage fund?

That these judgments are legal, valid and binding on this court, cannot for a moment be doubted, for they were rendered in the courts of the State of Louisiana, after due proceedings had in said courts, and hence, but two questions can arise :

1st. Had the court that rendered these judgments jurisdiction ?

2nd. Was the defendant before the court at the time the judgments were rendered ? Christmas vs. Russel, 5 Wall., 305 ; Thompson vs. Whitman, 18 Wall., 457.

1st. The jurisdiction of the court to homologate the assessment rolls and render the judgment cannot be disputed, for the proceedings were had in the courts specially designated, and invested with the authority they exercised.

2nd. As we have seen the proceedings resulting in the homologation of the assessment roll in the First District, for the first installment of ten per cent. were commenced and conducted by the Board of Commissioners provided for in the Act of 1858, against the parties designated on the assessment rolls, including the City of New Orleans to whom the notices required by the act were addressed, and they were duly published (Record, pp. 117 and 118 and 125 and 126), and after judgment was rendered against the City of New Orleans, she appeared and appealed, but afterwards failed to complete her appeal, abandoning the same and acquiesced in the judgment and paid a part thereof. (Record, pp. 374 and 375 and 385.)

In the Second Draining District the proceedings were likewise commenced by the Commissioners of that district, against the parties designated on the assessment rolls, including the cities of New Orleans, Carrollton, etc., and like notices were issued to all whom it might concern (which certainly included the above cities) to show cause, if any they had, why the assessment rolls should not be approved and homologated, and not appearing and showing cause, judgment was rendered approving and homologating said rolls, and the assessments became thereby merged into judgments. (Record, pp. 158 and 159.)

Surely the above was a sufficient and a proper citation to bring a party into court and whereon a judgment might be based. 11 A. 338; 10 A. 764, 767; 10 A. 727, 771; 12 A. 751; ~~13 A. 751, 93, 26, 430, 37,~~; 13 A. 405; Dillon, Municipal Corp., 815 (653) to 817 (655) 20 a p 140

And such a proceeding does not deprive a person of his property without due process of law. 96 U. S., p. 97.

There was, therefore, in the above matters, a suit in court, a plaintiff, a defendant, a notice and a day in court. Is not, then, this matter as to the first installment in the First Drainage District and the debt on the full assessment against the city of New Orleans, both above and below Toledano street, definitely settled and *res adjudicata?* That was the precise point determined.

Can the city now be heard to say she does not owe these judgments, based upon the assessments on the

superficial feet of the public streets and squares? That might or might not have been a good defence in this matter when she was notified to show cause and defend; but having failed to appear, the judgment was rendered against her, and all delays in which the matter of liability could be reviewed on appeal has long gone by. Surely there must be an end to litigation some time.

As to the other installments (second to tenth inclusive) in the First Draining District and the full amount of the assessments in the Third and Fourth Draining Districts, the assessment rolls were filed, proceedings conducted by, and judgments of homologation were asked for, and rendered at the suit of the Board of Administrators of said city of New Orleans. (Record, pp. 119 to 122, and 129.) There are no longer any assessments, because they have been merged into judgments, which are new debts which take their creation and existence from the date of their rendition. Freeman on Judgments, Secs. 215, 216 and 217, (Edition of 1881); Mason, vs. Eldred, 6 Wall. 231; Ober vs. Gallagher, 93 U. S., pp. 206 and 207; the United States vs. New Orleans, 98 U. S. 375; Ries vs. Rowland, 11 Fed. Rep., p. 661. The same rule prevails in Louisiana: McKee vs. Cairnes, 2 N. S., p. 599; Abat vs. Buisson, 9 La., p. 417; Oakey vs. Murphey, 1 A., p. 372; Denison vs. Payne, 7 A., p. 333; West Feliciana Railroad vs. Thornton, 12 A., pp. 737 and 738. See also Taylor vs. Roots, 4 Keys, p. 344.

Here the question is asked: Could the city of

New Orleans sue herself? and we answer, perhaps not, in the broad sense of being both plaintiff and defendant in a matter of serious dispute and contest.

But could the city not confess a judgment?

But in the proceedings in question, her relation was that of trustee and administrator to the estate which she is administering, precisely like that of an executor of an estate to which he is indebted.

Surely there can be no doubt that the approval and homologation of an account in which a trustee or an executor puts himself down as a debtor constitutes a valid and executory judgment against such trustee or executor.

Succession of J. B. Capdeville vs. J. H. Erwin, 13 A., p. 286.

But above and beyond all this, the judgments against the City of New Orleans for the nine installments of assessments (second to tenth, both inclusive,) on the public streets and squares in the *First* Draining District were rendered by the Supreme Court of the State of Louisiana—the court of last resort—reversing the judgment of the lower court. (Record, p. 122, 27 Annual, p. 20.) The question of the right or wrong, the legality or illegality, is past, the final judgment is rendered and the debt is established.

But admitting, for the sake of argument, that the right to assess the City of New Orleans on her public streets and squares (for a part of the above assessments and judgments are based on the private property of the City of New Orleans) is open for inquiry

when the judgments are sought to be enforced, the question then arises, were these assessments lawful?

A similar provision was found in the Act of 1835, amended in 1839; and in the 11 Ann., p. 377, the Supreme Court says:

> "While we feel the almost impossibility of doing justice among so many persons with conflicting interests, we are satisfied that, whether we adopt the area or the value of the lots as the plan upon which the assessment is to be made, it will approximate the right so nearly, that less injustice and injury will be done, by adopting either, than by sending the case back for prolonged litigation and further proof upon this question.
>
> "The principle that it costs as much to drain one foot of land of little value as it does to drain an equal area of more value, and that were both alike benefited, prevailed as to the land below the ordinary level of high water in the lower coast. This seems to be recognized by the third section of the Act of 1839 which directed the appraisers in making the distinction to take into consideration principally the extent of the individual properties.
>
> "*The large proportion of the expense which by this view is thrown upon the city for these streets, meets in some measure that equity which has been urged upon our consideration, that as the work has been undertaken for the public good, the public ought to bear the charge of it notwithstanding the benefit to the owners of the soil.*"

The Supreme Court of this State has frequently decided that the streets of the City of New Orleans can be assessed, and that for the purpose of such assessments she is the owner. Marquez vs. New

Orleans, 13 A., 319: Succession of L. Foucher, 26 A., 363; Barber Asphalt Paving Co. vs. H. R. Cogreve, 41 A., p. 251.

The Act of the legislature provided for an assessment to be levied on each superficial foot of land within the prescribed territory, without exception, limitation or restriction, and the 8th section of the Act of 1859 (pp. 7 and 8 of Statutes) directing that all parties having them in possession should furnish to the Boards of Drainage Commissioners certain maps, and these were to include "the streets, roads, highways, or any section thereof, to be drained." Surely these could be required for the sole purpose of ascertaining the necessary tax for each square foot thereof to be paid by those having the charge and administration of such streets and roads.

The streets and squares of the City of New Orleans embrace about one-third of the territory to be drained, and if there was no liabitity on the city for this territory, two-thirds of the land drained would pay for the benefits conferred on all, while the general inhabitants, no matter how rich they might be in personal property and receiving all the benefits in a sanitary point of view, would pay nothing.

On the ground of the great public benefit conferred, apart from the benefit to the individual property-holder, the Supreme Court decided the city was liable to an assessment on her streets and squares.

As was decided in Davidson vs. New Orleans, 96 U. S., p. 97, these drainage tax judgments are beyond review in this court.

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Nor can it be urged that because a man may pay a tax per superficial foot and also one based generally on the value of all of his property, that, therefore, he pays twice for the same improvement.

Does he not receive two benefits? one to the land, and the general benefit common to all, in an improved sanitary condition?

A man may even be taxed twice on the same land.

In the 96 U. S. R., p. 106, the Supreme Court said:

> "It is said that the plaintiff's property had been previously assessed for the same purpose and the assessment paid. If this be meant to deny the right of the State to tax or assess property twice for the same purpose, we know of no provision in the Federal Constitution which forbids unequal taxation by the States. If the act under which the former assessment was made is relied on as a contract against future assessment for the same purpose we concur with the Supreme Court of Lousiana in being unable to discover such a contract.
>
> "It is also said that the property of the plaintiff which was assessed was not benefited by the assessment. This is a matter of detail with which this Court cannot interfere if it were clearly so; *but it is hard to fix a limit within these two parishes where property would not be benefited by the removal of the swamps and marshes which* are within their bounds."

Again. The assessment in the First Drainage District for the first installment and the entire assessment for the Second Drainage District, including the assessments on the public streets and squares, had been made and passed into judgment before Act

No. 30, of 1871 was passed, and these assessments, whether right or wrong, were in direct and positive terms *confirmed* and made exigible by that act, and the Board of Administrators were directed to collect them as they appeared on the books of said First and Second Draining Districts. And they were further directed to make other assessments [and, of course, the same kind] in the other districts where none had been made. [Statutes, p. 12.]

Nor is this all. The validity of the above judgments in the First and Second Districts is not only *judicially determined and legislatively declared*, but the City of New Orleans has herself subsequently admitted the validity thereof by paying Roselius & Phillips their fees for the recovery thereof, under ordinance No. 954, adopted July 5, 1871, [the details of which will be noticed hereafter], and she admitted and confessed her liability as to the other installments in the First Draining Districts, and the full assessments in the Third and Fourth Draining Districts when she filed the assessment rolls with the assessments thereon against herself and asked a judgment of homologation thereof. [Record pp. 170 and 171, and 183 to 187.]

And she again admitted her liability when she sought a revival of all the drainage judgments in all the Districts except the First, [which will be noticed hereafter, Record, pp. 152 to 155, 165 to 167, and 178 and 179.

And now after having done all this, and drawn and issued her obligations payable out of drainage

assessments, and allowed them to pass into third hands with the judgments against the city in full force on the assessment rolls, can she be heard to say, that the drainage assessments and judgments against her are null and void, and if not null and void are paid.

Surely the doctrine of estoppel must be applicable here.

Even a party who has received the benefits of an unconstitutional law will not be allowed to urge that unconstitutionality. 102 U. S., p. ~~415~~. 421

See also New Orleans vs. Southern Bank, 31 A., p. 560, where the court held the city was estopped by a statement she had furnished on which many hundred thousand dollars of bonds had been illegally delivered, from afterward alleging said statement was false and claiming back the bonds and the value thereof.

And the State may likewise be estopped. In the State vs. Taylor, 28 A., p. 462, the court said:

> "The State is bound by her judicial pleadings and admissions the same as private persons, and is entitled to no greater right or immunity, as a litigant, than they are. The doctrine of estoppel applies to the State just as it does to individuals. The plea in this respect is not *res adjudicata*, but estoppel, and should have been maintained, and consequently the State cannot be heard in this action to deny the constitutionality of these law statutes, the validity and benefits of which she has heretofore invoked."

Cited and affirmed in State vs. Ober, 34 A., 361.

Nor can it be said that the judgment for the first

installment in the First Draining District, and for the entire assessment in the Second Draining District, became extinct by confusion, when the city was subrogated to the rights of the Draining Commissioners under Act No. 30 of 1871.

This precise point was decided by the Supreme Court of Louisiana, in the case of the State ex rel. Carondelet Canal and Navigation Company vs. Pilsbury, Mayor, 30 A., 705. In that case the Park Commissioners, who had obtained a judgment against the City of New Orleans, were abolished and all their rights, duties and property were transferred to the City of New Orleans, and it was thereafter contended that the above judgment against the City of New Orleans became extinct by confusion but the court held otherwise.

The validity of the entire drainage tax judgments in the Fourth Drainage District, including those against the city, are especially disputed in defendant's answer and exceptions, (Record, pp. 24 and 95) and it is averred and seriously contended that no matter how the other judgments may stand, those in the Fourth Drainage District are absolutely null and have been so decided by the Supreme Court of Louisiana, because the law as to said Fourth Drainage District, under which the judgments were rendered, was unconstitutional, and the case of the Succession of Patrick Irwin, 35 A. p. 63, is cited; also in matter of Board of Administrators, etc., praying, where the court having but one individual claim before it undertook to wipe out all the

drainage tax judgments in that Drainage District. 34 A., p. 97 ; also 35 A., p. 68.

The unconstitutionality of the law (we repeat) might have been a good defense to the suit in which the judgment was rendered; but surely after the matter has passed into a judgment it is too late to inquire whether the law under which the judgment was rendered was constitutional.

But this is not all. The same court that rendered the above decision, at an earlier date (in 1875), the year within which our obligations, the judgment on which is the basis of the present suit, were issued, at the suit of Warner Van Norden, had commanded the Board of Administrators to collect the drainage taxes not only in the First, Second and Third Drainage Districts, but in the *Fourth Drainage District* as well. 27 Annual, R. p. 497.

We, then, have the same court commanding the collection of the tax in the said Fourth Drainage District, and declaring it null. Which decision shall control ?

Having paid our money for our warrants in good faith we propose to take our choice as to these decisions and adopt the one that is consonant with "truth, justice and law," for the decision contemporaneous with the obligation is a part of the contract itself. Douglass vs. County of Pike, 101 U. S., p. 77. Green County vs. Pike, 109 U. S., p. 104.

Subsequent decisions will not destroy acquired rights and judicial interpretations as they stood when the obligation was issued. Anderson vs. Santa Anna,

116 U. S., 356. Nor will this Court be governed by the oscillation in State decisions, Gelpecke vs. Dubuque, 1 Wall, 175 and 206, where the court said:

> "We are not unmindful of the importance of uniformity in the decisions of this court, and those of the highest local courts giving constructions to the laws and constitutions of their own States. It is the settled rule of this court to follow the decisions of the State Courts. But there has been heretofore, in the judicial history of this court, as doubtless there will be hereafter, many exceptional cases. We will never immolate truth, justice, and the law, because a State tribunal has erected the altar and decreed the sacrifice."

II.

There was error in holding that if said judgments against the city were legal and valid, they had been paid and over paid by the issue, and delivery of 7 per cent. Gold Bonds "Drainage Series" issued under section 13 of Act 73 of 1872, and delivered to the Canal Company, Van Norden transferee, and that by such alleged over payment the city had become a creditor of the drainage fund for a very large amount.

The principal defence, as we understand it (and which the court in its opinion sustains), is one of payment, or rather compensation or offset, by reason of the issue and delivery of $1,672,105.21 bonds of the Drainage Series, issued under Section 13, of Act No. 73, of 1872, to take up and pay drainage warrants given for excavations, canals, revetments and the like. (Record, p. 423.)

Has the City of New Orleans any right to charge the bonds of the "Drainage Series," issued under

Section 13, of Act No. 73, of 1872, for debts for *excavations, levees and revetments*, authorized by Act No. 30, of 1871, and laws previously enacted against the debt due by the city for assessments against her, on the streets and squares?

How the bonds *authorized* and delivered for one debt can be construed into a payment of another and an entirely distinct debt is hard to understand.

To do so would be a manifest and flagrant violation of the law under which they were issued, and would be a defeat of the object for which their issuance was allowed.

The law says they were to be issued to pay for excavations, canals and revetments, and not to pay assessments and judgments against the city.

They were to be issued for this purpose, because the drainage taxes theretofore provided in Act 30, of 1871, were equal to only about one-half of the estimated cost of drainage. This clearly appears from a mere inspection of the estimated cost of the work called for by the Mayor (Record, pp. 339 and 340), and its comparison with the total amount of assessments levied and to be levied and hereinbefore referred to.

(We say to be levied because the area of the land and the rate of the tax per square foot was known and the result was clear.)

The proceedings by the Council of the City of New Orleans to provide the additional means to pay for all the work required began by an ordinance introduced by Shaw (Record, p. 338), and ended in the

adoption of Ordinance No. 814 (Record, p. 340), and this the legislature ratified by said Section 13, of Act No. 73, of 1872 (Statutes, pp. 13 and 14), and if not in direct and positive terms, yet by fair implication, which is all that is necessary, Campbell vs. The City of Kenosha, 5 Wall, 194, and thus made the doubtful proceedings of Ordinance No. 814 as complete as if they had been particularly named, and relieved the ordinance from all taint of illegality. See also Gelpecke vs. The City of Dubuque, 1 Wall, 220; Thompson vs. Lee County, 3 Wall, 331. Ratification is equivalent to original authority. Beloit vs. Morgan, 7 Wall, 623; Grenada County Supervisors vs. Brogden, 112 U. S., p. 271.

By the above ratification the provision for bonds to pay for excavations, canals and revetments acquired the same force and effect as if it had been originally incorporated in Act 30, of 1871. In fact, when it was accepted by the company it was the contract between the Canal Company and the city which no subsequent legislation or constitutional amendment of the State could impair or destroy, as was attempted by the city and the State, and is contended for in suit No. 780.

The company and its transferee and assigns have the right to demand the bonds or cash for the work, and the city is *bound* to pay that cash or to issue and deliver the bonds.

The language of the law (Statutes, pp. 13 and 14), is "the city may issue," etc., but "may" here used, does not "devolve a mere discretion, but imposes a

positive and absolute duty." Supervisors vs. The U. S., 4 Wall, 435.

It was strenuously contended, in the lower court, that no contract could be claimed from Ordinance No. 814, because it had never been accepted by the Canal Company.

This claim was made notwithstanding the fact that Ordinance No. 820 (Record, p. 343), which laid out the work which the Canal Company was to do, expressly declared the company should do that work "subject to the terms and conditions of Ordinance No. 814, Administration Series," and notwithstanding the fact that the president of the company said it had accepted said terms, and was working under them (Record, p. 343), and notwithstanding the further fact that the company accepted, for the work done, drainage warrants of the form and with the limitation in said ordinance provided for. (Record, pp. 367, 373.)

This contention was based on the belief that there could be no acceptance by a corporation, except by a resolution of its board of directors. Such is not the law.

See Bank of the United States vs. Dandridge, 12 Wheaton, where the court, at page 72, said as follows:

> "In respect to grants and deeds beneficial to a corporation, there seems to be no particular reason why their assent to, and acceptance of the same may not be inferred from their acts, as well as in the case of individuals. Suppose a deed poll granting lands to a corporation, can it be necessary to show that there

was an acceptance by the corporation by an assent under seal, if it be a corporation at common law; or by a written note, if the corporation may signify its assent in that manner? Why may not its occupation and improvement, and the demise of the land by its agents be justly admitted, by implication, to establish the fact in favor, and for the benefit of the corporation? Why should the omission to record the assent, if actually given, deprive the corporation of the property which it gained by virtue of such actual assent? The validity of such a grant depends upon the acceptance, not upon the mode by which it is proved."

The debts provided for by the ratifying act are divided into two classes, viz:

First—"All unbonded debts existing December 31, 1871, and unpaid at the time of the passage of this act, or caused by the receipts of 1871 for revenues proper of 1872," and

Second—"*For excavations and levees, drainage machinery and revetments authorized by law or required for the protection of the city from overflow or inundation.*"

The former were all past due at the time of the passage of Act 73, of 1872 (April 26), and of the latter there was due then a sum corresponding with the amount of drainage work then done at fifty cents per cubic yard for canals dug and levees built, and the balance thereof was to become due from time to time until the drainage work was fully completed.

Bonds were to be issued for both kinds of the above debts, and they were to be called the "New Consolidated Debt of New Orleans," but those issued

for excavations, levees, etc., authorized by Act No. 30, of 1871, or drainage laws previously enacted, were to have the distinguishing mark of "Drainage Series," to show they were issued for excavations, and for the reason that the law declared, "that all taxes collected for drainage, and not required for the payment of drainage warrants, shall be devoted to the purchase from the lowest bidder of the bonds issued for drainage, and all were to be known as the "New Consolidated Debt of New Orleans."

Among the former class (unbonded debts existing on December 31, 1871, and unpaid on the 26th of April, 1872) were judgments against the City of New Orleans based on assessments on the streets, squares and private property of said city in the First and Second Drainage Districts, as follow:

In the First Drainage District there were judgments against the city aggregating $19,962.40, with interest, as per ordinance 954 (Record, pp. 344 and 345), based on the first installment (being 10 per cent.) of the drainage taxes levied in that district, and rendered March 11, 1863, and signed March 17, 1863. In the Second Drainage District there were also judgments against the City of New Orleans; some rendered in the parish of Jefferson and some in the parish of Orleans, aggregating $123,279,65 and interest (same ordinance), rendered in the respective parishes as follows: March 15, 1869, and signed on the 23d March, 1869, and rendered on the 11th November, 1868, and signed on the 16th November, 1868.

In addition to the above amounts there was also due by the City of New Orleans an additional sum, equal to 10 per cent. of the above amounts, to the attorneys who conducted the proceedings in court, which resulted in the above judgments. This was allowed under Act No. 67, of 1861, and the judgments rendered thereunder.

But at the time of the passage of the act (April 26, 1872) no assessments had been levied in the Third Drainage District or the Fourth Drainage District, or proceeding had in court thereon.

Now that these judgments, based on assessments in the First and Second Drainage Districts, and the 10 per cent. attorney's fees, were among the first class of debts above described, to-wit: unbonded debts of the City of New Orleans existing prior to December 31, 1871, and were not among the debts for excavations, levees and revetments, and that the city so understood, is clear, from the manner in which she, after she had become the successor of the drainage commissioners in those districts, undertook to pay and did pay said attorney's fees to Messrs. Roselius and Phillips, as follows:

Ordinance 954, A. S. (Record, pp. 344 and 345), after reciting the above judgments, declared:

> "Whereas the attorneys of said commissioners (C. Roselius and A. Phillips) are by law entitled to the ten per cent. of said judgments and interest:
>
> "Be it ordained, * * * that said claims be settled by the issue of certificates under Ordinance No. 882, Administration Series."

Said ordinance No. 882, after setting forth the inability of the city to realize in full its contemplated budget in cash, and its desire that all creditors holding matured obligations, against which the city had no defence, should receive a transferable acknowledgment thereof, and equitable interest thereon, then ordained :

> "Section 1. * * That holders of claims and accounts which the Council of the City Hall approve under this ordinance shall be entitled to a certificate under its provisions.
>
> "Sec. 2. * * That such claims and accounts shall bear interest from the issue of the certificates at the rate of seven and three tenths per annum, and said rate of interest shall continue until the payment or funding, under an act of the legislature, *and it shall be understood between holders of all certificates thereunder and the city, that the city shall not be sued thereon until after the adjournment of the regular session of the Legislature of* 1872, *and in case of its failure to pass a satisfactory funding bill.*"

Accordingly, on the 30th September, 1871, the city issued to Roselius and Phillips 7-30 certificates for $18,971.30, numbered from Nos. 4 to 22 inclusive, which, of course, under said Ordinance 882, were to be held without suit "until after the adjourment of the (next) regular session of the Legislature of 1872, and in case of its failure to pass a satisfactory funding bill." (Record, p. 473.)

After the passage of said funding bill (No. 73, of 1872), on April 26, 1872, S. D. Moody, as the holder of Nos. 4 to 16 of the above 7-30 certificates, deposited with and surrendered to the Administrator of

Accounts the above certificates, amounting to $10,000, and thereupon there was issued to him warrant No. 363 for bonds of the new consolidated debt (but not of the drainage series) at ninety cents on the dollar, amounting to $11,111.11, and on said warrant received bonds of said new consolidated debt of the general series, as follows: April 3, 1873, 11 bonds of $1,000 each, and on April 25, 1873, the balance of said certificate, to-wit: $111.16, with part of another certificate was funded into another bond of $1,000, of the general series. (Record, pp. 518 and 519.

P. E. Boyer also, after the passage of said act, as the holder of the balance of the above 7-30 certificates, Nos. 14 to 22, inclusive, amounting to $8,971.30, issued to Roselius & Phillips, as aforesaid, deposited with and surrendered the same to the Administrator of Accounts, and had issued to him warrant No. 373 for $10,000 of bonds of the new consolidated debt, general series, and on said warrant said Boyce, on the 9th of January, 1873, had issued to him 10 bonds, of $1000 each, of said new consolidated debt, general series. [Record, pp. 518, 519 and 520.]

In this manner said ten per cent. for the recovery of said above judgments were paid, not in bonds of the "Drainage Series," but of the general series, and simply because under said 13th section of the act, bonds of the "Drainage Series" could only be issued for excavations, canals, revetments and the like.

If, as is contended on the other side, that the issuance and delivery of the bonds of the "Drainage

Series" are to be now used to compensate the debts due by the city on assessments, those assessment debts must have been due at the time of the passage of the Act of the Legislature on the 26th of April, 1872, for the law says that for the unbonded debts of the city existing December 13, 1871, unpaid at the time of the passage of the law the city might issue bonds, etc.

Now, what are the facts? On the 16th of April, 1872, no assessments had been levied in the Third and Fourth Drainage Districts. The assessment in the Third District was levied on the 12th day of June, 1872, [Record, p. 114], and that in the Fourth District was levied on the 20th day of November, 1872, [Record, p. 114.] Surely there could be no debt due by the city in the Third and Fourth Drainage Districts until the assessments were levied. And the judgments based on the assessments in those districts, which it is contended was extinguished by the issuance and delivery of the "Drainage Series," were of still later date, viz: in the Third District the judgment was rendered November 8, 1872, [Record, p. 172], and in the Fourth District, March 15, 1873, [Record, p. 188.]

How, then, was it possible for the Legislature in the said section 13 to have provided for a debt due on the 31st of December, 1871, by the issuance and delivery of bonds of the "Drainage Series," when the debt which it is claimed was paid or compensated by such issuance and delivery of bonds was not known and did not come into existence until long thereafter?

Neither in the Act of the Legislature, in the ordinances of the city, nor in the transactions of the parties, is there to be found a line, a word, hint, or suggestion, that the bonds issued and delivered were a payment in whole or in part of the judgments due by the city, or were an advance or loan to the drainage fund.

But apart from the plain language of the statute and the contemporaneous history of that day, showing the reason and necessity for the issue of the bonds provided for in the statute, there could be no payment without an intention to pay.

The law upon this subject is as follows:

In Bloodworth vs. Jacobs, 2 A., p. 26, the court said:

> "But there is a preliminary inquiry to be made in order to determine this case, and, that is, as to the meaning of the word payment; concerning which our code removes all doubt. Payment is a mode of extinguishing obligations. It is not only the delivery of a sum of money, but the performance of an obligation. It is an act calling for *the exercise of the will—of consent;* without which it has not the characteristics of that mode of extinguishing obligations."
>
> "It by no means follows, because a banker has the money of his customers, that he can *apply it in payment;* or, that a factor selling a crop of the planter has necessarily the control of the proceeds. The disposition of the funds in both cases depends upon the agreement or course of dealing between the parties * * * If a factor receive a fund for a particular object under instructions from his principal, no law and no principle of morals will permit him to apply it to any other."

Judge Munger in his book "On the Application of Payments by Debtor to Creditor," says, at p. 24 :

> "*This intention* (to pay) *must be manifested at the time of payment.*" Citing Wilkinson vs. Sterne, 9 Mod. 427 ; Manning vs. Western, 2 Vern. 607 ; Stone vs. Seymour, 15 Wend. 19 ; Moss vs. Adams, 4 Ird. Eq. 42 ; Reynolds vs. McFarlane, 1 Overt. 488 ; Wheaton vs. Turnbull, 3 Green. 314 ; Boutwell vs. Mason, 12 M. 608.

In the case of the U. S. vs. Kirkpatrick, 9 Wheat. 737, the court said :

> "It is too late for either party to claim a right to make an appropriation (of payment) after the controversy has arisen."

As was said by the Supreme Court of the United States, in Ketcham vs. Duncan, 96 U. S., at p. 662 :

> "It is as difficult to see how there can be a payment and extinguishment thereby of a debt without any intention to pay, as it is to see how there can be a sale without an intention to sell."

And of this case Mr. Justice Lamar, as the organ of the Supreme Court, in Wood vs. Guarantee Co., 128 U. S., p. 424, said :

> "That case clearly settles the proposition that in such a matter as this, the question between payment and purchase, is one of fact rather than of law, to be settled by the evidence, largely presumptive, generally, in the case. It is a question of the *intention of the parties.*"

Now, with this law before us, let us inquire as to what the facts are from which defendant claims payment of the judgments rendered against her on assessments, by the issuance and delivery to the

Mississippi and Mexican Gulf Ship Company, of the bonds "Drainage Series," authorized and issued to pay for work done; and whether there was any such intention to pay at any time during the issuance and delivery of said bonds.

The judgments against City of New Orleans, according to the exhibits and showing of complainant, are as follows:

| | |
|---|---|
| In the First Drainage District—Judgment for the first installment levied in that district, being 10 per cent. thereof is [Record, pp. 192 to 197] | $ 20,584 40 |
| With 6 per cent. interest per annum from February 15, 1863, date of application (judicial demand) for homologation of assessment rolls; judgment for all remaining installments, date of application (judicial demand) for homologation of assessment rolls, with interest from December 7, 1871, at 6 per cent. per annum (Record, pp. 198 and 199) | 231,168 50 |
| Second Drainage District—In the Parish of Orleans (Record, pp. 161 to 163) | 71,431 81 |
| Payable in ten installments, with interest at 8 per cent. per annum from December 11, 1868, date of application (judicial demand) for homologation of assessment rolls. | |
| In the Parish of Jefferson (Record, pp. 149 and 150) | 123,749 99 |
| With interest at 6 per cent. per annum from June 16, 1868, date of application (judicial demand) for homologation of assessment rolls. | |
| Third Drainage District—Amount of judgment (Record, pp. 173 and 175) | 205,026 79 |

Interest according to judgment at 6 per cent. per annum from date of assessment, June 12, 1872.

FOURTH DRAINAGE DISTRICT — Amount of judgment (Record, pp. 188 and 189)..... 65,956 72
With interest at 6 per cent. per annum from January 30, 1873, as fixed in judgment.

The city has herself filed a statement showing the assessment against her, and which she claims was paid by the issuance and delivery of bonds of the drainage series, say $697,836.25, exclusive of interest (Record, pp. 420 to 423 and 610), on which interest should be computed, on each amount stated by the city, making up said sum of $697,836.25 from the dates given above.

Now, the city, from the commencement of the delivery of the bonds until January 7, 1875, when she ceased her issuance and delivery, had taken up with her bonds $1,387,887.58 of drainage warrants at 90 cents on the dollar, delivering for said warrants $1,538,764.12 in bonds (Record, p. 430), while the total of these bonds issued up to January 1, 1875, for this and other purposes was $1,672,105.21. (Record, p. 423.)

Here is a delivery of the drainage series of bonds for nearly double the face of the judgments. When a man has finished paying his debts he usually stops his payment, but in this case the issue of bonds does not stop when the amount of bonds equals the amount of the judgments, but continues on as the work progresses until the constitutional amendment, going into effect January 1, 1875, and only ceases,

because of this amendment, at which time the face of the bonds is double the face of the assessments.

The certified copies of judgments against the city (because the act of 1861 said the homologation of the assessment rolls should make them judgment (Statutes, p. 9), bear no marks or endorsements of any kind showing payment, while they remain in full force and vigor in the courts, on the drainage books, and in the mortgage office, where they are recorded, and no receipts are produced tending in any way to show payment, while the evidence of Mr. Laroque, who has been connected with the collection of drainage taxes ever since their levy, shows there never has been any entry or endorsement made or receipt given tending in any way to show any payment or satisfaction of these judgments, while the universal custom was, when a drainage tax judgment was paid, to give a receipt for the amount paid and mark said payment on the drainage tax rolls opposite the name of the party against whom the tax was assessed. (Record, pp. 46 and 47.)

Surely this excess of bonds over and above the amount of judgments does not indicate any intention to pay said judgments by such delivery.

In January, 1875, a mandamus suit on relation of Warner Van Norden was brought against the Mayor and Administrators of the City of New Orleans (27 A., p. 497), to compel the city to issue execution and collect the drainage judgments, in order to raise money to pay drainage warrants, issued after the

constitutional amendment went into force. The pleading evidence and judgment thereon are in evidence here. (Record, pp. 323 to 335.) In that suit the Mayor of New Orleans filed on the 11th of February, 1875, a statement showing the amount of drainage tax judgments then outstanding and due, and he put the amount *then* due by the City of New Orleans (which was after the last bond had been delivered) at $701,000, exclusive of interest. (Record, p. 335.)

The court ordered the mandamus to issue, notwithstanding the evidence of Van Norden was taken in that case, and showed bonds of the drainage series had been issued to him for more than a million dollars—an amount certainly in excess of the amount of judgments due by the City of New Orleans. (Record, p. 331.)

Surely it had not up to this time been the intention of the city officers to construe the issue and delivery of the bond of the "Drainage Series" into a payment of the drainage tax judgments against the city.

And the details and formalities observed in the issue and delivery of the bonds of the "Drainage Series" show an entire absence of intention on the part of the City of New Orleans and its officials to pay by such issuance and delivery said drainage judgments against the city.

Those details and formalities were as follows: The above 13th section of the act provided no bonds should be issued without the authority of the Coun-

cil. (Statutes, p. 14.) Hence the Mayor and Administrator of Finance were appointed a committee to examine all drainage warrants presented for funding (Record, pp. 347 and 348), and they made an examination and finding, as follows:

"City of New Orleans, May 15, 1872.

"Memorandum of Drainage Warrants deposited this day in the Department of Public Accounts by J. W. Pearce for conversion into New Consolidated Bonds under Ordinances Nos. 1,484 and 1,501, viz:

| | | |
|---|---|---|
| No. 31—$1,000, | 8 per cent. per annum interest from Sept., 1871, 254 days. .... ..... | $ 56 44 |
| No. 33— 1,000, | 8 per cent. per annum interest from Sept., 1871, 254 days..... | 56 44 |
| No. 34— 1,000, | 8 per cent. per annum interest from Sept., 1871, 254 days..... | 56 44 |
| No. 254—19,549, | 8 per cent. per annum interest from May 7, 1882, 8 days... ..... | 34 75 |
| $22.549 | | $204 07 |
| 204 07 | interest. | |

$22,573.07, at 90 cents on the dollar to.. $25,291 19

"For which amount an issue of warrants for New Consolidated Bonds, Drainage Series, signed by the Mayor and Administrator of Finance, and attested by the Administrator of Public Accounts, is hereby authorized as follows:

| | | |
|---|---|---|
| Nos. 24 and 25— | two warrants for $10,000 each.. | $20,000 00 |
| 26 to 29— | four warrants for $1,000 each.... | 4,000 00 |
| 30 | —one warrant for..... | 1,281 19 |
| (All dated May 15, 1872.) | | $25,281 19 |

Countersigned, J. C.

[Signed] BENJ. F. FLANDERS.

[Signed] JOHN S. WALTON, Mayor."
Ad. Finance.

(Record, pp. 474 and 475.

The above finding having been made and the warrants given up, the owner of the drainage warrant gave this receipt :

"New Orleans, May 19, 1872.

"Received of the City of New Orleans, warrants (Drainage Series) for Twenty-five Thousand Two Hundred and Eighty-one $\frac{19}{100}$ Dollars for conversion into New Consolidated Bonds in exchange for Drainage Warrants this day surrendered by me to City and the interest thereon as per statement dated this day, signed by me, and also deposited in the Dep't of Public Accounts, the warrants (Drainage Series) received by me being as follows :

| | | |
|---|---|---|
| Nos. 24 and 25 | —two warrants dated May 15, 1872, $10,000 each ..... | $20,000 00 |
| 26 to 29 | —four warrants dated May 15, 1872, $1,000 each ..... | 4,000 00 |
| 30 | —one warrant dated May 15, 1872, for ..... ..... | 1,281 19 |
| | | $25,281 19 |

[Signed] J. W. PEARCE."

(Record, p. 475.)

At a later date the form of finding and the receipt was changed slightly but the substance was the same :

"City of New Orleans, July 7, 1874.

"The Administrator of Public Accounts is authorized and directed to deliver to W. Van Norden, six thousand dollars in a warrant for new consolidated bonds, drainage series No. 302, in conformity with ordinances Nos. 1484, 1507, 1554 and 1563.

As for drainage warrant No. 437, dated July 3, 1874, amounting to $5,400 which has been deposited in the Department of Public Accounts for conversion into the new consolidated gold bonds, drainage series, equal at the rate of 90 cents on the dollar to $6,000.

Countersigned, N. S. C.

[Signed] LOUIS A. WILTZ,
Mayor.

[Signed] LOUIS SCHNEIDER,
Administrator of Finance."

(Record, p. 475).

The form of receipts given at this time was as follows:

" New Orleans, July 7, 1874. Received from John Calhoun, Administrator of Public Accounts, warrant No. 302, dated July 3, 1874, for six thousand dollars in new Consolidated Gold Bonds, Drainage Series, *in full for Drainage Warrant* above *described.*

$6,000. [Signed] W. VAN NORDEN."

(Record, p. 476.)

The warrant here spoken of for the consolidated gold bond drainage series was merely an order on the Administrator of Finance to deliver to the bearer said bond, which he did, and took up said warrant or order. (Record, p. 474).

This completed the transaction and no where in all the details thereof does there appear the slightest *intention* on the part of the city or any of its officials of a purpose to pay the drainage assessments against the city by the issuance and delivery of the

bonds of the drainage series. Nothing was paid, or intended to be paid, but the drainage warrants, issued and delivered for the debts for excavations, canals and revetments built under the administration of the city as provided for in "Act 30 of 1871 and drainage laws previously enacted." And such was the finding of the master. (Record, p. 78).

The language of the receipt is "in full for drainage warrant above described," and this warrant was but the exponent, voucher and proof of the excavations made and canals dug for which the 13th Section of the Act 73 of 1872, authorized the issuance of the bonds.

And the city well knew she could not under the law pay any debt due by her, and "unpaid on the 31st of December, 1871," by the issuance and delivery of the bonds of the drainage series as it is abundantly shown by the transaction herein before referred to with Roselius & Phillips, where she paid them their interest in the judgments she owed in the 1st and 2d drainage districts for assessments, for she delivered them bonds, not of the drainage series, but of the general series, and simply because the assessment debts were not debts due for excavations, but fell in the first class of debts mentioned, to-wit: debts upaid and due on the 31st of December, 1871, whereas the debts for excavations were to become due from time to time as the work progressed.

But say the other side, no matter what the acts or intention of the city resulting therefrom, she is an

artificial person whom the court will regard as a minor, and the doctrine of estoppel can never be urged against her. Such was not the law as laid down in the City vs. Southern Bank, 31 A., p. 560, herein before cited.

Even the State may be estopped by her judicial pleadings and admisssion the same as a private individual. The State vs Taylor, 28 A. 462; The State vs. Ober, 161, also heretofore cited.

It is therefore clear, no payment was made or intended to be made of the drainage judgments against the city at the time of the issuance and delivery of the bonds of the drainage series. This, in fact, will be hardly disputed, but it is contended rather that by such issuance and delivery of the bonds of the drainage series, the drainage fund became indebted to the city for the amount of said bonds so issued and delivered, and the court is now asked to compensate and offset the debt due by the city on the judgments rendered against her by the amount of bonds of the drainage series issued and delivered to pay for the excavations and canals, represented by drainage warrants.

The total amount of these bonds issued and delivered by the city is $1,672,105.21. (Record, p. 423.) The total amount of drainage taxes which came under administration by the city, including the assessments, reduced to judgment against her was $1,699,737.11, (see computation herein before made) of which there had been collected by January 1, 1875, $70,572.38, computed from statements

of collections (from Record, pp. 436 to 452), leaving a balance then due of $1,629,064.78 which gives $42,941.18 more of bonds then issued than all the drainage taxes then outstanding, or in other words, if this alléged right of compensation and offset is correct, the drainage fund was then indebted to the city in the sum of $42,944.18 by reason of the aforesaid bonds of the drainage series on the 1st of January, 1875.

But is this correct? Was the drainage fund at any time indebted to the city on this account? What says the legislature on the subject? For there can be no doubt that the State (and the city her creature), can be estopped by the legislature. Act No. 22, of the year 1874, proposed an amendment to the constitution of the State, and the same became an amendment to said constitution going into effect January 1, 1875. This amendment prohibited the increasing of the debt of the city after that date, but at the same time provided that said act should not be so constructed as to prevent the issuance of drainage warrants "payable only from drainage taxes and not otherwise." (Statutes, pp. 22 and 23.)

Now, what did this mean? Did it mean there were drainage taxes to meet said warrants and pay them, or did it mean that such drainage taxes, as the other side contend, were then due to the city by reason of the issuance and delivery of the bonds of the drainage series?

Nor is this the only legislative act directly ad-

verse to the right of compensation and set-off now made by the defendants. On the 24th of February, 1876, the Legislative Act No. 16, of that year, authorized the City of New Orleans to purchase all the dredgeboats, tools, machinery, implements and franchise of the Mississippi and Mexican Gulf Ship Canal Company from said company and W. Van Norden, its transferee, and to pay for the same by the issuance and delivery of drainage warrants, payable out of drainage taxes. (Statutes, pp. 15 and 16.) Surely as late as 1875 it was the intent and meaning that there were *then* drainage taxes, out of which said warrants could be and should be paid.

It was not, therefore, the intention of the legislature of the State that the judgments against the city should be paid by the issue and delivery of bonds of the "Drainage Series," and this is manifest:

1st. From the mere reading of Section 13, of Act 73, of 1872.

2nd. From the mere reading of the Constitutional Amendment, going into operation Jsnuary 1st, 1875, which authorized the further issuance of drainage warrants, drawn against drainage taxes, when the total issue of bonds to that date exceeded all the drainage taxes then uncollected.

3rd. From the mere reading of Act No. 16, of 1876, authorizing the purchase of the dredgeboats, etc., by the then issuance and delivery of drainage warrants drawn against drainage taxes, when the total issue of bonds to that date still further exceeded all the drainage taxes then uncollected.

Nor was it the intention of the *City of New Orleans, or the Canal Company, or Van Norden, its transferee,* that said judgments were paid by the issue and delivery of said bonds of the "Drainage Series," and this is manifest:

1st. By the fact that said judgments stand to-day and did at the time of the issuance of all the drainage warrants now out, uncancelled and in full force in the courts, the mortgage office, and the record of the Drainage Bureau, while the universal custom was to give a receipt in case of payment and mark the record "paid."

2nd. By an examination of the formalities and details observed in the issuing and delivery of bonds of the drainage series, given to fund drainage warrants issued for excavations, canals, etc.

3rd. By the city's paying a small part of said judgment [Roselius & Phillips], in bonds of the general series.

4th. By the city's going into court and asking for a revival of the judgments of the entire assessment rolls, without limitation or exception, when said judgments were about to become prescribed, which was after the last bond was delivered.

She has imputed [as was her duty under the law], the issuance and delivery of bonds of the "Drainage Series" to the payment of drainage warrants [Vouchers for the excavations called for in the law], and she cannot now be allowed, even a part from the direction of the law under which they were is-

sued, to impute them to the payment of assessment judgments.

But, farther than this, there is another clause in Section 13, of Act 73, of 1872, which forbids the use of drainage taxes for any purpose other than the payment of drainage warrants, as long as there is a warrant unpaid to which we have not yet called the court's attention, viz:

> "And all taxes collected for drainage and not required for the payment of drainage warrants shall be devoted to the purchase from the lowest bidder of bonds issued for drainage."

This, it seems to us, forever settles this question against the claim of payment.

The drainage tax judgments, including those against the city, are the property of the warrant holders, any excess thereof, above the amount of warrants outstanding and unpaid is the property of the city, to be used to buy and extinguish the drainage bonds, but only after the drainage warrants are paid. It is true the entire amount of drainage taxes were far from equal to the estimated cost of drainage, and hence the necessity for the issue of the bonds; and if the work had been completed and paid for in bonds, *then* the city was authorized to appropriate the drainage tax collections to the purchase of bonds, as far as the same would go, but as long as a drainage warrant is outstanding this right of appropriation of the drainage tax is unauthorized. This alone settles the alleged right of compensation and offset against the City of New Orleans.

Nor is this all; the judgments against the city are drainage tax judgments, and are not subject to offset and compensation. See the City vs. Davidson, 30 A., p. 541. Davidson had paid taxes to a greater amount than the city had a right to demand, and plead such excessive payment in compensation of taxes due in a subsequent year. The court said:

> "A tax is not a debt in the usual and ordinary sense of the word. It is not a contract between two parties, but the imposition of a tax is a positive act of the government binding upon the inhabitants, and does not require their individual or personal consent to enable it to be enforced. *Taxes are not demands against which set-off is admissible, says Cooley.* Taxation 13 and authorities cited in note. They are to be regarded not as a debt, but as a contribution required from the citizens for the support of the government. Union Co. vs. Bordelon, 7 A., 192."
>
> "Considerations of public policy require that a tax of one year should not be compensated by an overpayment of a previous year. The taxes of each year are made to meet the exigences of that year. If they could be reduced by a deduction of such sums as had been already wrongfully demanded and paid, the revenues requisite for the support of the government might be diminished so largely as to occasion public detriment. *But outside of this public policy, as a matter of law, taxes are not such demands as admit of a plea of compensation.*"

On the same principle the city would have no right of compensation or offset, by reason of any thing she had paid, or done, as long as the drainage system remained uncompleted, because the exercise of such a right, would destroy the purpose of the

legislature, in providing the means necessary for its completion.

Compensation, under the laws of Louisiana (Article 2209, Civil Code), takes place only between two debts, having equally for their object a sum of money, or a certain quantity of consumable things of one and the same kind, and which are equally liquidated and demandable.

The city, by ratification of Ordinance 814, by section 13, of Act 73, of 1872, became the absolute debtor for the costs of drainage, and being vested with the collection of the drainage taxes, could pay for the costs of excavations, canals, etc., by paying the drainage warrants issued in evidence of the excavations made and canals dug and levees built, *first*, by collections and realizations from drainage taxes; *second*, by the issue and delivery of bonds of the "Drainage Series" which, in turn, were to be paid by the excess of drainage taxes that might remain after the payment of all drainage warrants.

This is not only the meaning of the law as therein expressed, but it was so fully understood by the City Council, as appears in Ordinance 1504, which, after authorizing the preparation of said bonds of the "new consolidated debts," ordained. (Record, p. 347.)

> "That the bonds issued for excavations and levees required by Act 30, of 1871, or by drainage laws previously enacted, shall be of the denomination of $1,000, and shall be marked 'Drainage Series,' *and all funds received from drainage assessments and not required*

*for the payment of drainage warrants shall be devoted to the purchase of bonds of the* 'Drainage Series,' according to law."

Perhaps it will be asked here, "as it was in the lower court, if the cost of drainage was made a debt of the City of New Orleans, by the 13th section of Act No. 73, of 1872, why should said city issue her bonds for excavations made and protection levees built in the City of Carrollton, Parish of Jefferson, which only became a part of the City of New Orleans on the 23d of March, 1874?" The answer is, simply because the legislature of the State directed her to issue them, and the reason for such direction is found in the language of the act, where it declares that all funds received from drainage assessments (those in the City of Carrollton, Parish of Jefferson, as well as those in the City of New Orleans, Parish of Orleans), and not required for the payment of drainage warrants, should be devoted to the purchase from the lowest bidder of bonds issued for drainage. These bonds were denominated "Drainage Series," evidently to show for what they were issued, and that they were intended to be paid in the above manner.

It may not be amiss to briefly summarize the position of the defendant on this question of payment. It is proved, we think, that when the bonds of the "Drainage Series" were issued and delivered no payment was intended by the city of the drainage judgments against the city, but it is contended there was, at least an open account begun between the city on one side and the drainage fund on the other.

On the one side of the account were the drainage judgments, and subsequently the amount of drainage funds collected and misapplied (which latter will be noticed hereafter.)

On the other side of the account are the bonds of the "Drainage Series," issued and delivered for canals, revetments, etc., the cost of which had been represented by the drainage warrants, paid by the delivery of said bonds.

The provision for the issue and delivery of these bonds began in Ordinance 814, and the delivery thereof commenced in May, 1872, after the ratification of said ordinance, by Act 73, of 1872, and was continued from time to time, as the work progressed, up to January, 1875, when the constitutional amendment went into effect, when all drainage warrants (with the exception of about $23,666.59 (Record, p. 435), paid in cash from drainage taxes) issued prior to that date and not then funded, were funded into bonds of the drainage series, and thereafter the further issuance of these bonds ceased.

Up to this time no balance was struck to see how the account stood.

The further issuance and delivery of bonds was prohibited and ceased by said constitutional amendment, it is contended, but by said amendment drainage warrants were allowed to be issued and were issued, "payable solely from drainage taxes."

The drainage work continues from January 1, 1875, to June, 1876, and drainage warrants for excavations, canals, revetments, continue to be issued,

payable according to the above amendment "solely out of drainage taxes, and not otherwise." Still there is no adding up of the sides of the account and no balance is struck.

On the 6th of June, 1876, Van Norden and the Canal Company sell all their dredge boats, implements, machinery, etc., pursuant to Act No. 16, of 1876, to the city of New Orleans, for $320,000 of drainage warrants, payable under the terms of that act solely out of drainage taxes and not otherwise, and these $320,000 of warrants and those for a greater sum similarly drawn and issued pass into the hands of third parties for value.

And still there is no adding up of the columns or balancing of the account.

The complainant being the holder and owner of three of the above drainage warrants, representing a part of the drainage work done between January 1, 1875, and June, 1876, on the 18th day of December, 1884, brought suit thereon against the City of New Orleans, and a voluminous defence is made, and judgment is finally rendered in favor of plaintiff for $6,000 and interest, papable out of drainage funds.

When the judgment is final, execution issued thereon and returned *nulla bona*.

Still no balance is struck to see how the account stands, and no pretence of any payment is made.

The complainant then having a solemn judgment, payable out of drainage funds, filed his bill (this suit) for an accounting against the City of New Orleans, of said drainage fund, and finally in March,

1888, she files an answer denying all indebtedness to the drainage fund, either on the drainage judgments rendered against her, because (as she says in her answer), they are null, and also denies all indebtedness on account of misappropriation of drainage funds collected by her, or otherwise, and *avers for the first time* that if the drainage funds against her are valid, and if she has been guilty of misappropriation of drainage funds, if the account is now made up it will show that she has issued bonds of the drainage series for $1,672,105.21, and this is more than all the judgments against her and all of the misappropriation of drainage funds she has collected, and in fact more than all the drainage taxes outstanding at the time of the passage of the Act No. 73, of 1872, on the 26th of April, 1872, and as a consequence, the drainage fund was indebted to her before the complainants' drainage warrants forming the basis of the judgment on which this suit is brought, were issued, and consequently there is no drainage fund out of which the same can be paid.

She says (by her conduct, at least): I have allowed you to do the drainage work. I have accepted the work you have done. I have issued you for said work drainage warrants, payable solely out of the drainage funds, and not otherwise in accordance with the Constitution of the State. I have taken the valuable plant, dredge boats, tools, derricks, implements, and your franchise and handed you $320,000, payable solely, under an express act of the Legislature, out of the drainage taxes and

not otherwise, but when the warrants were issued from time to time for the work done since January 1, 1875, and for the property aforesaid purchased by my offices and delivered to me for said $320,000 in drainage warrants, payable as aforesaid, the fund, out of which they were thus payable by the constitution of the land, and a subsequent Act of the Legislature, was indebted to me, for previous advances, and when the account is made up (it is not now) it will be seen the fund has been overdrawn, you have checks on a broken bank, and nothing more. And this is what the defendant calls being in a court of equity and doing equity.

Did the constitutional amendment, which, in connection with Act No. 30, of 1871, awarded a warrant for work done, payable only out of drainage funds, mean, that when the pay day of a solemn judgment based on that warrant arrived, the city would then have the right against the owner of that judgment—a third party—to offset and destroy the fund against which it was drawn and out of which it was payable?

Did the Act of the Legislature of 1876, authorizing the sale by Van Norden and the company and the purchase by the city, by the issuance and delivery of drainage warrants, payable solely out of drainage taxes mean, that when demand was made on the city for the payment of those warrants, she would have the right to claim by offset, that said drainage fund was then indebted to her for an amount exceeding the entire amount of the drainage taxes, because of the issuance and delivery of bonds of the "Drain-

age Series," all prior to the issuance and delivery of the said drainage warrants, now presented, and especially by a third party, whose rights were acquired when the now pretended right of offset was never before dreamed of, not even by the city herself?

The very plea of payment here contended for admits the validity of the judgments against the city. Article 2133, of the Civil Code, says: "Every payment presupposes a debt," and in Martin vs. Dickson, 35 An., p. 1036, it was held that a plea of payment admitted the debt.

It is true that a portion of the judgments based on the assessments on the streets, squares, etc, in the Second Drainage District, were rendered against the City of Jefferson, the City of Carrollton and the Police Jury of the parish of Jefferson.

The City of Jefferson, prior to the Charter of the City of New Orleans, of 1870, was immediately above the City of New Orleans, the upper line of which was Toledano street, and the City of Jefferson extended up as high as street.

Above the City of Jefferson some distance was the City of Carrollton.

Between the Cities of Carrollton and Jefferson, were Greenville, Bloomingdale, Burthville, L. F. Foucher's property, Friburg, Marly and a part of the Metairie Road, which were all within the drainage district, and were governed by, and subject to the control of the Police Jury of the parish of Jefferson, and the assessments on the area of these streets were assessed against said Police Jury of the parish of Jefferson. (Record, pp. 149 and 150.)

In 1870, March 16, a new charter was granted to the City of Orleans, by the Legislature (Act No. 7, of 1870), and the territory subject to said new charter was increased so as to embrace all the land in the said City of Jefferson and the above-named towns up to the lower line of Carrollton, the said entire city territory being described in the first section of said act as follows:

> "Commencing on the Mississippi river at the Fisherman's canal, thence along the left bank of the Mississippi river to the lower boundary line of the present city of Carrollton; thence along said boundary line to the point where it intersects the present boundary line of the City of New Orleans; thence along said boundary line to Lake Pontchartrain; thence along said lake shore to the lower boundary line of the City of New Orleans; thence along said boundary line to the point of commencement on the Mississippi river, and that so much of the present parish of Jefferson, as is contained within the aforesaid boundaries, is hereby detached from the parish of Jefferson, and annexed to the parish of Orleans."

And the 34th section of said act, after providing:

> "That all the right, title and interest of the *City of Jefferson*, as now existing in and to all lands, tenements, hereditaments, bridges, ferries, streets, roads, wharves, markets, stalls, levees and landing places, buildings and other property of whatever description and wherever situated and of and with all goods, chattels, money, effects, debts, dues, demands, bonds, obligations, judgments, and judgment liens, actions and rights of action, book accounts and vouchers, be and are hereby vested in the City of New Orleans, as incorporated by this act."

Further declared :

* * * "And the debt and all other indebtedness or liabilities of the City of Jefferson, * * * whether in the form of bonds, notes, interest coupons, cash warrants or other species of obligations whatever, shall be assumed and paid by the City of New Orleans, as constituted and incorporated by this act, and said city is declared liable therefor." (Statutes, pp. 19 and 21.)

This legislation clearly made the City of New Orleans responsible for all the judgments rendered against the City of Jefferson.

The territory of the City of New Orleans, was again extended by Act No. 71, of 1874, approved March 23, of that year, the first section of which provides :

"That all that portion of the parish of Jefferson being and lying below the centre of Upperline street of the City of Carrollton, commencing at the Mississippi river and extending northwardly along the centre of said street to its terminus, and thence along the centre of the line of the New Orleans and Carrollton Railroad to Lake Pontchartrain, shall be and constitute the upper bounding line of the parish of Orleans and the City of New Orleans, and all that portion of the City of Carrollton, thus detached from the parish of Jefferson and added to the City of New Orleens and parish of Orleans, shall be governed by the Mayor and Administrators of the City of New Orleans, in accordance with existing laws, etc.

"And the fifth section of said act after providing that all the rights, titles and interest of the City of Carrollton as now existing in and to all lands, tenements, hereditaments, bridges, ferries, streets, roads, wharves, markets, stalls, levees and landing places,

buildings and other property of whatsoever description and wherever situated, and with all goods, chattels, money, effects, dues, demands, bonds, obligations, judgments and judgment liens, actions and rights of action, book accounts and vouchers be and they are hereby vested in the City of New Orleans." * * * *

Thereafter declared :

"And the debt and all other indebtedness or liabilities of the City of Carrollton, including the funding and improvement bonds, and the bonds issued to the Jefferson City Gas Light Company, and known as the 'gas bonds and notes,' interest coupons, wages, salary due or to become due, warrants or other obligations whatsoever, shall be assumed and paid by the City of New Orleans, and said city is hereby declared liable therefor." (Statutes, pp. 21 and 22.)

This law makes the judgments against Carrollton a debt of the City of New Orleans.

It will here be noticed that the judgments rendered against the police jury of the Parish of Jefferson, based on the assessments on the streets of Huntsville, Bloomingdale, Burthville, Greenville, Friburg, Marly, all the streets running across the L. F. Foucher property, Market square, and the Metairie road are not provided for in either of the above acts, and although the territory in which these streets were located, and which was situated between the former cities of Jefferson and Carrollton, was annexed to and became part of the City of New Orleans by said Act No. 7, of 1870.

The question then arises as to who became responsible for these judgments rendered against the police jury of the Parish of Jefferson.

The judgments in question, it will be remembered, were based on assessments on the superficial feet of this land, and the land in question, under the act of 1870, passed from the dominion of the police jury of the Parish of Jefferson and the dominion of the City of Carrollton, and became the City of New Orleans, and by reason thereof, and independent of any statutory provisions, said City of New Orleans, as the successor of said police jury of the Parish of Jefferson became responsible therefor.

See Watson vs. Mobile, 116 U. S. R., page 289, and the numerous authorities, State and Federal, there cited.

And here we might stop, as the ~~payments~~ judgments against the city, with interest thereon, is more than sufficient to pay all the drainage warrants outstanding with interest thereon.

And especially is this true if our position in suit No. 780 is correct, that all drainage warrants outstanding, and given for canals, excavations, etc., are entitled to be paid by the issue and delivery of bonds of the "Drainage Series" provided for in said Section 13, of Act 73, of 1872.

III.

There was error in the courts holding that the administration of the City of New Orleans of the drainage affairs imposed on her under Act No. 30, of 1871, and Act 16, of 1876, had been judicious and proper, and had not resulted in waste, damage and destruction of and to the drainage fnnd.

A detail of the statement of the assessments here-

tofore given in all the districts, with the collections by the drainage commissioners in the First and Second Districts before the transfer to the city, is as follows:

| | | |
|---|---|---|
| Total in First Drainage District | $751,401 80 | |
| Collected by commissioners up to transfer to city in June, 1871, in asylum property received for taxes | $171,239 11 | |
| Collected from individuals | 79,448 67 | |
| | $250,687 78 | |
| Leaves coming to the city June, 1871, in First Drainage District | | $ 500,714 02 |
| (Record, p. 610.) | | |
| Total assessment in Second Drainage District | $681,750 45 | |
| Deduct ninth and tenth installments remitted by act of legislature 28, 1867 | $136,350 10 | |
| Balance | $545,400 35 | |
| (Record, pp. 421 and 422 and 610.) | | |
| From this amount should be deducted amount collected by commissioners to June 1, 1871, where city to charge | $255,492 95 | |
| (Record, p. 610.) | | |
| Total coming to city in Second Drainage District | | $289,907 40 |
| Amount assessment levied by the city after transfer to her in Third Drainage District | | $627,598 93 |
| (Record, p. 610.) | | |
| Amount assessment imposed by city in Fourth Drainage District | | $281,416 81 |
| (Record, p. 610.) | | |
| Making a total of | | $1,699,637 16 |

Drainage tax judgments with which city became charged.

Now, what has the city done with this fund since June, 1871? What has she collected? What remains uncollected, and why does the same remain uncollected?

A detailed statement, furnished by the city, shows the entire collection by her since June, 1871, is $335,554.98 up to October, 1888, exclusive of attorney's fees, which, under Act of 1861, were 10 per cent. in addition to the amount of the tax, but this sum includes the interest collected on each collection, and the total of said interest is stated to be $61,308.04;

| | | |
|---|---|---|
| Making the face of the assessment collected | $ | 273,401 85 |
| (Record, p. 435.) | | |
| This deducted from amount coming to New Orleans | | 1,699,637 16 |
| Deduct the above face of assessments collected by the city since June, 1871 | | 273,401 85 |
| Leaving the balance of assessments that should be now due of | $ | 1,426,235 31 |
| From which deduct city judgments, stated by the city to be | | 697,936 28 |
| Amount due by individuals | $ | 728,299 03 |

All exclusive of interest.

Now why are these amounts uncollected?

And here it will be well to examine into the duty of the City of New Orleans with respect to these collections.

In the first place she was the trustee of this fund and it was her duty, under her obligations as such,

to reduce the tax judgments into cash with all possible rapidity, and they were all due and exigible before the work was done, as was decided in the 27 A., p. 20.

But independent of this the Legislature (Act No. 30 of 1871), Section 7 provided that the Mississippi and Mexican Gulf Ship Canal Company should be required to have ready for work, within fifteen days after the passage of said Act (it was promulgated March 14, 1871), machinery of sufficient power to excavate at least 25,000 cubic yards of earth per month, and to increase said machinery to at least the capacity of 50,000 yards of excavation per month. (Statutes, p. 11).

The compensation was 50 cents per cubic yard, to be represented by drainage warrants issued to the Mississippi and Mexican Gulf Ship Canal Company. (Statutes, p. 11).

It will therefore be seen that from the outset (June 1, 1871) $12,500 was required monthly, and this sum was increased to $25,000 monthly to take up the drainage warrants, and there is no pretense that the company at any time failed to perform the amount of work required under Act of the Legislature, while, as a matter of fact from the monthly reports the City Surveyor's office show the work done each month far exceeded the above requirements under the Statute.

To meet the above warrants given for excavations, the 9th section of said Act No. 70 of 1871 declared :

"The said Board (of Administrators) shall collect the assessments herein authorized *in time* to provide for the payment of the warrants to be issued to the company *at the date* of their issuance." (Statutes, p. 12.

With this declaration of the duty of the city before us, we will ask why are the assessments against the City of New Orleans unpaid? She could easily have paid them by the issuance and delivery of the 7 per cent. gold bonds of the general series provided for in section 13 of Act No. 73 of 1872, (Statutes, p. 13 and 14), in the same manner as she paid Roselius & Phillips 10 per cent. for the recovery of the drainage judgments in the First and Second Drainage Districts, and she can pay them now through the Board of Liquidation of the city debt of New Orleans by the issuance and delivery of the 5 per cent. bonds provided for in Act No. 67, of July 9, 1884. (Statutes, pp. 29 to 31).

And why are the amounts against individuals uncollected?

The best way to answer this question is to examine what the city has done towards collecting the same.

The city assumed charge in June 1871, and from that time to January, 1875, three and a half years, she collected in principal and interest, ($88,547.78, (Record, p. 231).

On the 1st of January, 1875, the constitutional amendment went into force (Statutes, p. 22 and 23) and the further issuance of bonds of the drainage series for excavations, etc., whether rightfully

or wrongfully ceased, and the collections of taxes being so limited and the unwillingness of the city to execute the law and collect the taxes being so great. Mr. Van Norden, the transferee of the Canal Company, brought a mandamus suit, on the 19th day of January, 1875, in the Superior District Court of the Parish of Orleans to compel the city to issue writs of *fifa* on the drainage judgments, and the lower court ordered said city to issue writs of mandamus in said First, Second, Third and Fourth Drainage Districts, and to collect the taxes without delay. (27 La. An., p. 497).

The answer of the City of New Orleans is in evidence, and it is instructive and material in this case as showing the appreciation of her obligations and duties as a trustee toward this fund, and how she observed the commands of the Legislature.

And although Van Norden had been the transferee of this company for several years, and the suit was based on drainage warrants issued to him as such and accepted by the city, it denied his right to stand in judgment, and then averred it was seeking by all proper means and just endeavors to collect the tax, and that it had a special sub-department and staff, and employees for the purpose of collecting; that there was no law requiring it to seize and sell property assessed for drainage taxes without first endeavoring to collect it by means less harsh; that very much of the property on which the tax rested was in the rear of the city, and if sold would not bring the amount assessed; that no sale could be

effected of said property and no advantages would result from the issuance of writs of *fieri facias*. (Record, pp. 323 to 338).

It almost seems as if part of the present answer was copied from that case.

The lower court made the mandamus peremptory. The Board of Administration appealed, and the city, independantly of the Board of Administrators as a third party having an interest in the judgment, was allowed a separate appeal. (Record, p. 337).

The Supreme Court affirmed the judgment of the lower court, 27 A. page 496, and commanded the city to issue executions as prayed for, and the result demonstrated the absolute falsity of the defence of the city.

A statement has been offered by the defendant in this connection (Record, pp. 617 and 618) with the evidence of A. E. Aubertan, deputy sheriff (Record, pp. 754 to 759), of a number of executions issued under the above mandamus.

This statement shows the first writ was issued July 13, 1875 (which must have been on the above proceedings becoming final), and that between that date and March 3, 1879, there were issued 1,571 writs.

| | | |
|---|---|---|
| Of these there were satisfied in full..... | 613 | |
| Of these there were satisfied in part..... | 9— | 622 |
| Leaving the number of writs not satisfied..... | | 949 |

What was done under these writs, or that anything was attempted under them, nowhere appears.

The amount realized under the satisfied writs for the drainage fund (for there were no attorney's fees or commissions (28 La. A., p. 158) as all the work was done by City Attorneys) was $32,466.69.

The amount of costs paid by the city, according to the above statement, was $950.50, but whether this came back to the city from the results reached under the above writs does not appear, but in any event the net amount could not have been less than $31,516.19.

The above results, forced from the city by the Supreme Court, were accomplished between July 13, 1875, and the time of the sale of the boats and franchise by the Company and Van Norden, in June, 1876, for, as appears by another statement made by the same deputy sheriff [Record, pp. 593 to 598], but one writ issued after that date, to-wit: in May, 1879, which was stayed by execution, and no effort was ever made to have it set aside.

But the above is only a part of the result that came from the above mandamus proceedings, for, as appears from other statements [Record, pp. 231 to 233], there were collected during the first six months of 1875, $25,075.95, and during the remaining six months, $102,080.50, making for the year, $127,-176.75. For the first six months in 1876, $23,-672.85 were collected. On the 6th of June, in this year, the sale occurred, and as above stated, but one writ was issued thereafter, which seems to have been abandoned.

The entire collections of principal and interest

from June, 1871, when the city took charge, to January 1, 1875, three and a half years, were only $88,547.78, notwithstanding James Guthrie's efforts, who was employed in December, 1873. His employment will be noticed hereafter.

Now why was the amount of collection for the above three and a half years so small as compared with the collections of 1875? Simply because, in said three and a half years the city merely kept an office — a drainage bureau — in the City Hall, where a drainage taxpayer might hand in his money as he saw fit, but no efforts were made by the city to enforce the collection of the tax. [Record, p. 643.]

From June, 1876, to October, 1888, twelve years and three months, the entire collections in principal and interest amounted to $105,502.75, of which $41,414.16 was in cash and the balance, $64,088.59, was in drainage warrants (Record, three tabulated statements following, p. 593), or about $8,000 or $9,000 a year, being more in the first years and as low as $ during the last year, while the salary of officials at the "drainage bureau" has been $6,000 per year and commissions.

And why have the collections become so small? Perhaps it would be better to ask how they became so large? for we assert that the city has done everything in her power, as well as the Legislature of the State, to defeat the collection of these drainage taxes.

After the city became the owner of the franchise, in 1876, the issuance of executions stopped.

In 1877, the Legislature, by Act No. 48, with about $700,000 of drainage warrants out and unpaid, passed a law relieving a large portion of the drainage territory from the payment of the drainage taxes imposed thereon (Statutes, p. 17), and by Act No. 67, of the extra session of 1877, passed another law relieving the defendants from all personal liability on drainage judgments rendered against them (Statutes, p. 18), and finally on the 23d day of June, 1882, by section 42, of the present City Charter, abolished all laws pertaining to drainage and the collection of drainage taxes. (Statutes, p. 19.)

And the conduct of the City of New Orleans has been even more reprehensible.

On the 5th day of April, 1881, the Council of the City of New Orleans adopted an ordinance, No. 6970, A. S., authorizing the Mayor to issue, and on the following day he did issue and publish, his proclamation, advising the drainage tax payers not to pay their taxes until the validity thereof was passed upon by the Supreme Court of the State (Record, p. 321), (as if they had not already been passed upon by the Courts), and in the First Drainage District by said Supreme Court, and affirmed by the Supreme Court of the United States. (27 La. A., p. 20; 96 U. S. R., p. 97.)

But what decision, and on what subject did the Council and Mayor expect? Simply on the subject, whether the scheme on which the City of New Orleans had entered after the purchase of the dredge boats and franchise, in June, 1876, of refusing to

complete the drainage system, and of abandoning the same, would be held by the Supreme Court (as it had been held by the lower court, in Davidson vs. The City of New Orleans, 34 La. A., p. 170), as a proper ground for the non-collection of the drainage tax, or, in other words, whether her own illegal acts would be held as a legal obliteration of the tax.

It seems almost incredible that a trustee could be so lost to its duties and obligations as to advise the parties indebted to the trust, not to pay their debts, but yet such is the case.

In 1881, the Council of the City of New Orleans adopted another ordinance (No. 264, Council Series) providing for the appointment of a committee to inquire into drainage taxes. (Record, p. 476.)

In May, 1883, in the face of Ordinance No. 1877 (Record, p. 114), levying the assessment in the Fourth Drainage District, and the judgment of the court homologating the same (Record, pp. 188 and 189), decreeing the drainage taxes therein payable at once and in bulk, the City of New Orleans, by Ordinance No. 2128 (Record, p. 599), construed the same as payable in the annual installments, and declared that, when collected, said taxes should only be paid out for work done in said Fourth Draining District.

Again, in 1883, a committee was appointed in pursuance of a resolution of the Council of the City Orleans, and on the 15th of May, 1883, in pursuance thereof, said committee reported at length, and after going into the history of the laws pertaining to drain-

age, declared there was $120,000 of drainage taxes then outstanding and uncollected, which might then be collected, but that no efforts had been, for some time previous, and none were then being made by the city or its attorneys toward the collection of this tax; and then the report enters into an elaborate discussion of the decision of the Supreme Court of Louisiana, 34 A., and shows how the drainage tax payers can avail themselves of the doctrines there laid down and avoid paying their drainage taxes. (Record, pp. 476 to 479.)

What a spectacle! A trustee charged with the collection of a trust fund, publishing—yes, boasting, as it were, of its absence of effort to collect the trust fund, and showing the debtors of that fund how to get rid of the solemn judgments awarded by the courts of the country against them and their property.

The exactions of the law for the amount of work to be done (which was to cost at the least $25,000 monthly, Statutes, p. 11), being so great, and the collections by the city being so small, and the value of the bonds of the "Drainage Series" so depreciated (Record, pp. 661 and 662), Van Norden, to whom the money was due, employed Guthrie to pursuade the drainage tax payers to pay their taxes in drainage warrants, which he sold them for that purpose — and this because the city would make no efforts to collect the tax, beside keeping an office open, where the same could be handed in, (Record, p. 643), and even denied the right of the drainage warrant holder to have the tax judgments enforced by execution,

(Record, pp. 327 and 328), and in consequence of which, said Van Norden was compelled to sacrifice fifteen cents on the dollar of each warrant, (Record, p. 645), of about $200,000 of said warrants used to pay drainage taxes, (Record, pp. 435, 631), between the date of Gutherie's employment in December, 1873, and this sale to the city in 1876.

It is true two city attorneys, C. Buck and J. W. Gurley, have sworn the foregoing proclamation by the Mayor of the City of New Orleans had no effect on them in their efforts to collect the drainage taxes, but could they swear it did not have a most disastrous effect on the payment of the taxes, for the tax payer is always looking for an excuse for the non-payment of his taxes.

Moreover, Mr. Buck has said that for the first term of his office (two years) he had nothing to do with the collection of taxes, (Record, p. 673), and what he did thereafter, as well as what Mr. Gurley did, will be noticed hereafter.

The first of the city attorneys whose name appears in connection with the collection of the drainage taxes, is that of the late Mr. S. P. Blanc. Of his ability and energy there can be no doubt, but that he had no appreciation of the duties of the City of New Orleans in connection with the collection of this tax is most manifest from the answer he signed and filed for the City of New Orleans in the mandamus case already referred to (Record, pp. 327 and 328) but it is true that after the Supreme Court informed him as to the duties of his client, his

prosecution of the collection of the drainage taxes became vigorous, as shown by the result then accomplished, which was $127,166,75 collected in one year, as against $88,547.78 collected in the three and a half years previous.

Mr. Blanc was succeeded by Mr. Buck, with Mr. Gurley as assistant, both of whom have been examined. [Record, pp. 673 to 679, and 651 to 658]. They were in office for something like three years from 1880. From Mr. Buck's evidence it clearly appears that for the first two years he did nothing toward the collection of drainage taxes, and during his last term of office he appeared and defended a few cases brought to erase the drainage tax judgments, under the authority of the case of Davidson vs. The City of New Orleans, 34 A., p. 170; while Mr. Gurley shows that his efforts to collect this tax consisted mainly in waiting until the taxpayers went into insolvency, died, or were sold out by the sheriff, and in those cases he caused the drainage tax bills to be prepared and filed against the proceeds of the property sold, and he asked for the payment of the taxes, therefrom. [Record, pp. 652 and 653]. Waiting until the end of the man, by death, civil or natural, or disaster consumated by a sheriff sale, and then presenting the bill against the property, and this is what is called doing everything in their power to collect the drainage tax. Surely if their power is to be judged by what they did, that power must have been of a most puerile kind.

Surely the report of the committee of five (Rec-

ord, pp. 476 to 479); called for under resolution of the City Council, in which they declared the city was not then (May, 1883), doing anything, and had not been doing anything for some time previous, to enforce the collection of the drainage tax judgments, and this in the face of the fact that there were then $120,000 of taxes susceptible of being collected by execution, means something, and the report then shows how this amount of tax can be gotten rid of under the above Davidson suit against the City of New Orleans.

Nor is this all. The drainage tax judgments were judgments for money, and were prescriptible by ten years, and when these ten years were about to expire the proceedings were prepared by Mr. Butler, not a City Attorney, but an attorney for drainage warrants holders, to revive them in all the districts, and although signed by the City Attorneys in all the districts, except the first (and in that district Mr. Buck, the City Attorney, refused to bring the suit or sign the petition compelling Jno. Crossley & Sons, of Halifax, England, to bring the suit in their own name (Record, p. 484), which they did, and expended in costs of court between $3,000 and $4,000, and in counsel fees about $17,000, (Record, pp. 523 to 525), all the proceedings in court were conducted by Mr. Butler in all the cases.

It is true the city justified its action in this behalf in reference to the revival of judgments in the First Drainage District under the decision of Davidson vs. New Orleans, 34 A., p. 170, but even that deci-

sion is solely based on, and made possible because of the dereliction of duty on the part of the City of New Orleans, because it had not complied with its duty under the law of 1876, completed the drainage system, drained, protected and benefitted the land on which the tax was levied.

There is in evidence a statement of the amount of tax involved in the above Davidson case which we have said was lost because of the dereliction of duty of said City of New Orleans, defendant in that case (Record, pp. 322 and 323), for which she is clearly responsible to the drainage fund. In that case the court found not only that the land had not been benefitted, but it was not then worth the taxes imposed thereon, and Mr. Forman has sworn that said land was afterwards sold for about one-eighth of the drainage taxes imposed thereon, but that was because it was flooded by water when it rained and was entirely undrained; and after June, 1876, it became the duty of the City of New Orleans to drain and protect the land from overflow from the lake and thus render it valuable and the tax collectable.

But apart from the value of the land when drained and protected, the judgment was a personal judgment, as was expressly decided by the Supreme Court of Louisiana in 27 A., page 26, in overruling all oppositions to the homologation of the drainage tax rolls in the very drainage district wherein the Davidson land was situated. (Record, p. 419.) Among which oppositions was the one of Mrs. Rey (offered specially in evidence), which also directly

raised the point that no personal judgment could be rendered [Record, pp. 321 and 322), but such was nevertheless rendered, as will appear from an inspection of the judgment homologating the rolls in that district, and yet not a single execution was ever issued by the city directed against any other property of this or any other delinquent than the land assessed.

And the evidence is clear that at the time the drainage rolls became final the estate of Davidson was abundantly able to pay the judgment, for the inventory of the succession showed property in the Parish of Orleans valued over $500,000, with a yearly rental of $19,000, with the only debt shown against the estate was $1,000 in 1873, and none thereafter. [Record, pp. 481 and 482.]

Surely the city has made herself responsible for this judgment, which the extract from the record of the Supreme Court of the United States and the drainage tax rolls show was $53,867.26, and this bore, under the law, 6 per cent. interest from demand, which we understand to mean the date of filing the rolls in court and praying for their homologation the 7th of December, 1872.

Nor is this all. That judgment not only lost to the drainage fund the amount of money embraced therein, but since that date it has become the settled law of the State that where no benefits have been conferred and the land has not been drained, no tax could be enforced [Record, pp. 87, 648, 655 and 656, 674], for the City of New Orleans, as was shown in

that case, had abandoned the system of drainage and rendered herself incapable of completing the same, and numerous decisions to the above effect and based thereon have been rendered, relieving the property from all liability and entailing great loss on the drainage fund.

The principal defence of the city for not collecting the drainage taxes, is that the lands would not sell for the taxes due thereon. To completely dispose of this defence we have offered in evidence 24 extracts of bills of sale of unimproved land [alleged to be worthless], taken by the city for canal purposes, showing sales for amounts vastly in excess of the taxes imposed thereon [Record, pp. 349 to 367], on which the tax in the First District was 3 $\frac{3}{10}$ mills and in the other districts 2 mills per foot, except in the Second District where the tax was by prior Act of the Legislature reduced one-fifth in amount.

For the same purpose we have also offered 25 other extracts of sales selected at random from unimproved property, also showing sales greatly in excess of the drainage tax. [Record, pp. 390 to 405.] Among the latter is the sale from the Canal Bank to Bright for $50,000 [Record, pp. 398 to 401], where the tax was less than $1,600 [Record, p. 283], also bills of sale from Bradish Johnson to various parties [Record, pp. 401 and 402], of a few lots of ground for $4,550, on which the taxes would not amount to $150, yet the taxes on these pieces of property remained in full force on the drainage rolls until after the decision in the Davidson case, when they were

erased under the authority of that case. [Record, pp. 406 to 408, and 409 and 412.]

The purchase of the franchise contract and tools of the Mississippi and Mexican Gulf Ship Canal Company by the City of New Orleans was under Act No. 16, of 1876 (Statutes, pp. 15 to 17), and thereafter, and under said law the City of New Orleans became solely charged with the right, and the duty was imposed on her of completing the drainage and draining and protecting the land from overflow.

In view of this law and her duty thereunder can she now be heard to say she cannot collect the tax because the land is not worth the amount of the tax imposed? It was her duty to drain it and render it valuable, to complete the system; drain and protect the land, to the end that the tax might be earned and collected.

There is no pretense that the land now undrained would not be worth the tax imposed, if it was drained, and the evidence is uncontradicted that it can be drained, and would be worth the tax when drained and protected. (Record, pp. 671 and 498.) Shall the city not then, for her failure to do her duty in this behalf, be held for the tax, which she has rendered uncollectable by her failure of duty in the premises?

She clearly is responsible for the $120,000, which the committee of the Council reported could be collected as late as the year 1883, but which could not now be collected because of the subsequent depreciation, all due to overflow and want of drainage and protection.

Is not the City of New Orleans responsible, in addition to the judgments against her of $697,836.28 and interest, for the drainage tax judgments against individuals now outstanding, stated by the master to be exclusive of interest, $728,299.03. Record, pp. 81 and 82.)

These sums are manifestly and *solely* destined under the law to the payment—

1st. Of the outstanding work drainage warrants given prior to the purchase of the dredge boats, tools and implements for dredging, and the franchise of the company on June 6, 1870, and

2d. Of the drainage purchase warrants given for said dredge boats, tools, etc., at the time of said purchase in June, 1876.

There can be no doubt that prior to the purchase by the City of New Orleans, from the Mississippi and Mexican Gulf Ship Canal Company and Van Norden, the transferee of the dredge boats, tools, implements, etc., that it was the duty of that company and its transferee to complete the drainage system, under Act No. 30, of 1871, and this duty and obligation could have been enforced by appropriate remedies. The city was given, under Act No. 16, of 1876, the exclusive control of all the *rights, powers and franchises, granted by Act 30, of 1871*, relative to drainage or other public works, to the Mississippi and Mexican Gulf Ship Canal Company; and to the rights of this company and its transferee the city was duly subrogated by the company and Van Norden, transferee, in the bill of sale

and transfer of June, 1876, in these words. (Record, pp. 250 and 251) :

> "And the Mississippi and Mexican Gulf Ship Canal Company, through its president and secretary aforesaid, and the said Van Norden, as transferee and pledgee aforesaid, and in his own name individually, declared that they do, by these presents, *subrogate the City of New Orleans* in and to all and singular the *rights, actions and remedies* to which they are or may be entitled, under and by virtue of the aforesaid Act No. 80, of 1871, or of all other acts of the Legislature of this State, and under and by virtue of the aforesaid acts, passed before the said Andrew Hero, Jr., notary, respectively on the 22d day of May and the 22d day of November, 1872, thereby authorizing the said City of New Orleans to exercise and enjoy the said rights, actions and remedies in the same manner and to the same extent as the said Mississippi and Mexican Gulf Ship Canal Company, and the said Van Norden, as transferee and pledgee, and in his own name individually, might or could have done."

This right, permission, "exclusive control" and subrogation, coupled with the rights of holders of outstanding warrants, to be paid from drainage taxes, and the public necessity for the completion of the drainage system imposed on the city an absolute duty to complete the same. The law is clearly stated in Supervisors vs. U. S. ex rel., 4 Wall., p. 435, as follows :

> "Where power is granted by statute to public officers in permissive language — as they *may*, if deemed advisable do certain things — the language used will be regarded as peremptory, when the public interest or individual rights require that it should be."

After said purchase, then by the City of New Orleans, under Act No. 16, of 1876, said city became solely charged and it was her clear duty to finish the drainage system, then two-thirds completed, drain the land and protect the same from overflow, and for the accomplishment of this end she was invested with the proper means to be raised by assessment on the land, or to be paid for from the general treasury of the City of New Orleans, as will clearly appear from section 4 of said act, which reads as follows:

> "Be it further enacted, That whenever the sale and purchase contemplated by this act shall have been completed, and the drainage warrants issued, in payment of the price agreed on and fixed, the City of New Orleans, through its officers, shall have exclusive control of all the rights, powers and franchises granted by Act No. 30, of 1871, relative to drainage or other public works to the Mississippi and Mexican Gulf Ship Canal Company, or its transferee; the City of New Orleans alone shall have the power either through its own officers and employes, or by contract to the lowest bidder, to do all canalling, dredging, ditching or drainage works required to be paid for by assessments upon the property, or from the City Treasury." (Statutes, pp. 16 and 17.)

At the time of the passage of this law, in February, 1876, there was no limit on the city's power of taxation, that would in any way interfere with or prevent the City of New Orleans from raising all the money needed to complete the drainage system.

It is true the city has undertaken to meet this position and show there was such a limit, by offer-

ing the rates of taxes levied in 1875,-'76,-'77 and subsequent years (Record, pp. 740 to 742), but the finding of the master, based on the evidence adduced by the defendant herself, show this is not so, and that there was ample power for raising all monies needed to complete the work. (Record, pp. 86 and 87 and 90.)

The rate of taxation in force at the time of the passage of said Act No. 16, of 1876, is found in section 15, of Act No. 73, of 1872, which is as follows:

> "First—A tax sufficient to meet the interest on the city's bonded indebtedness and also to meet the requirements of the sinking fund, and
>
> "Second—A tax for current city expenses, including police and exclusive of interest and schools. This tax shall in no year exceed 1¼ per cent. upon the assessed value of legal personal and mixed property." (Statutes, pp. 13 and 14.)

And there can be no doubt that a part of the "current city expenses" under the above Act No. 16, of 1876, was the expense of draining and protecting the city from overflow. (Record, p. 88.)

There was no attempt to repeal this rate of taxation until the passage of the premium bond Act (No. 31, of 1876), which was approved on the 6th of March, 1876, and which provides as follows, section 6: (Statutes, pp. 31 and 32).

> "The said tax to be raised shall be denominated the premium bond tax and shall be separately mentioned in the tax rolls and receipts, provided that the taxable power of the corporation of the City of New Orleans for all purposes including general administration, school, police, lighting, salary of officers, court expenses and

> every other purpose of government, including the sum to be raised to pay premium bonds as above stated, shall never, until the full, complete and final payment of the said premium bonds exceed the rate of 1½ per cent on the dollar of all the assessed value of property subject to taxation within the limit of said City of New Orleans."

This was passed ten days after the passage of the Act No. 16 of 1876, (Statutes, pp. 15 and 16), under which the city became solely charged with the duty of drainage and bound to drain the land, protect the same from overflow and thus make said land valuable to the end that the drainage tax out of which the drainage warrants were payable, might be fully paid.

There can be no doubt of the city's duty under said Act No. 16, of 1876.

Nor can there be any doubt that the limitation of the rate of taxation as prescribed in said premium bond act was and is entirely null as to its effect upon the city's obligation to levy taxes to meet obligations in force prior to the passage of said premium bond act.

This was expressly decided in Louisiana vs. Pilsbury, 105, 29 A., page 278, citing all the leading authorities on this subject, and among others quoting as follows, page 301:

> "The case of Von Hoffman vs. City of Quincy, reputed in Fourth Wallace, is a leading case on this subject. The court there said that when a State has authorized a municipal corporation to contract and to exercise the power of local taxation to the extent necessary to meet its engagements, the power thus

given cannot be withdrawn until the contract is satisfied. The State and corporation in such cases are equally bound."

But the city having the power to raise the means to complete the drainage system has disregarded the same and the work has not only been abandoned, the work done by the Mississippi and Mexican Gulf Ship Canal Company allowed to become useless and worthless by reason of canals dug to be clogged and filled with filth, (Record, pp. 80, and 81, 494, 495, 497 to 498,) but the seven powerful dredge boats with all the accompanying tools and apparatus, have been suffered through the negligence of the City of New Orleans to rust, rot and become absolutely worthless.

See evidence of Moody and Brosnan, together with Brosnan's report to the Council, (Record, pp. 37, 38, 39 and 40, 319 and 320); and much of the machinery has been under city ordinance sold for junk, and some traded for timber for bridges. See evidence of Collins. (Record, pp. 272 and 273).

Now what has been the consequence of the refusal of the city to do its duty in this behalf?

It is clearly set forth in the case of Davidson vs. The City of New Orleans, 34 A., p. 170, and in that case it resulted in an absolute loss to the drainage fund of $53,167.25, with interest at 6 per cent. per annum from December 7, 1871, the date of the demand made for the payment of tax and the homologation of the drainage tax rolls.

And as a further result this decision has now be-

come the settled law on the collection of drainage taxes. And none of them can now be collected or enforced when any resistance is made in the courts, as will clearly appear from the evidence of J. W. Gurley, Jr., as assistant city attorney, for many years in charge of the collection of these taxes. (Record, pp. 656, 657 and 677).

And to the same effect is the report of the committee of five of the members of the City Council of said city, in May, 1883, who declared that under the decision in the Davidson case, no drainage taxes can be enforced where the defenses resorted to in the Davidson case are urged, and who further show that the taxes are only paid in those cases where it would cost less to pay them than to employ counsel to have them erased. (Record, pp. 476 to 479).

There is no evidence to show that if the system had been completed and the land drained and protected from overflow, it would not have been fully worth the amount of the drainage taxes imposed thereon, and could have been sold for the taxes due thereon. In fact there is evidence to show such would be the result of a completed system of drainage. Record, pp. 80, 671, 498).

Such being the case, the city is liable for the destruction of the drainage fund out of which the drainage warrants were payable, and did thereby become liable for the amount of said warrants with the interest thereon ?

Perhaps, on the other side, it will be urged that the city cannot be held liable on this ground, because

she was prohibited under the constitutional amendment of 1874, from increasing her indebtedness, but that amendment clearly means she could not contract a debt subsequent to the adoption of the amendment, whereby her indebtedness would be increased. But it was never intended to screen her from the consequences of prior obligation or her unlawful acts, committed in violation of duties imposed on her under the Act 30, of 1871 (Statutes, pp. 9 to 13), or from the consequences of torts she might commit. Dillon, M.C. § 137

But suppose we are wrong in this matter? There can be no doubt that the lands on which a very large part of this tax, now remaining unpaid, rests on land that is worth more than the tax.

The committee of the City Council, in May, 1883, reported this amount at $120,000, which is exclusive of interest.

Now, all the drainage taxes bear interest from different dates in the different drainage districts, varying from June, 1868, and December, 1868, to January 30, 1873, and a fair average of interest, taking all the drainage districts together would be about sixteen years.

| | |
|---|---|
| Interest on the above $120,000, reported by the committee of the City Council as collectable in 1883, say for 16 years, at the rate of 6 per cent., is.. | $114,200 00 |
| Add principal..... | 120,000 00 |
| | $234,200 00 |

This being now uncollectable, under the jurisprudence of Louisiana, because of the non-completion of the drainage system and the abandonment of that and all other system of drainage by the City of New Orleans, there can be no doubt of the city's liability therefor.

Should the above amounts be adopted as the amount for which the city is responsible (of course independent of the amounts she may owe on the judgments rendered against her), there should be added thereto the amount lost to the drainage fund by the decision in the Davidson case, which is not included in any of the statements furnished by the city and which is as follows:

| | |
|---|---|
| | $ 53,867 26 |
| With interest at 6 per cent. per annum from the date of the demand, which was December 7, 1871, the land being all in the First Drainage District, say 17 years, to December 7, 1888 ..... | 54,944 60 |
| | $108,811 86 |

IV.

There was error in the court's holding; there had been no misappropriation of the drainage funds collected, except an item of $14,000, of attorneys' fees, and that this item was more than paid by the issue and delivery of the aforesaid bonds to Warner Van Norden, transferee, of the Canal Company, between May 10, 1872, and December 31, 1874.

This involves an inquiry into how much drainage tax the city has collected and what she has done with those collections.

The city has furnished a statement of all her collections and disbursements, with a recapitulation as follows: (Record, p. 435.)

| | | |
|---|---|---|
| Total collections from the four drainage districts, consolidated | $364,596 60 | |
| Less 10 per cent. attorney's fees | 29,041 91 | |
| | $335,554 69 | |
| From which deduct received for taxes in drainage warrants | 215,862 97 | |
| Leaving balance collected in cash | | $119,691 72 |
| **Out of which she has paid—** | | |
| First, salary of Mayo, Guthrie, etc., as per statement | $ 52,006 65 | |
| Second, to Van Norden, transferee, as per statement | 23,666 59 | |
| Third, for old drainage act, as per statement | 44,118 29 | 119,791 53 |
| Showing an overdraft of | | $ 99 81 |
| Amount collected in cash from June, 1871, to July, 1876 | $ 78,748 51 | |
| In warrants | 151,174 18 | 229,922 69 |
| Amount collected in cash from July, 1876, to October, 1888 | 40,943 21 | |
| In warrants | 64,688 71 | 105,632 00 |
| | | $335,554 69 |
| It will thus be seen that the total amount of cash she has collected, exclusive of attorney's fees, is | $119,741 53 | |
| Out of this amount she paid Van Norden, transferee, as holder of drainage warrants | 23,666 59 | |
| Leaving a cash balance of | | $96,074 94 |

There can be doubt that the above payment to Van Norden to take up drainage warrants was correct and proper, but the same cannot be said of the other payments or alleged payments by which the above balance of $96,074.94 was used up.

First. As to the $52,006.65, said to have been paid as salaries of Mayo, Guthrie, etc., as per statement furnished, the heading of which is as follows:

> "Statement showing amounts paid to W. T. Mayo, bookkeeper, J. B. Guthrie, collector, and others out of drainage collections from February, 1875, to October, 1888. (Record, p. 458.)

The first payment is entered:

February, 1875, W. T. Mayo, salary for January.....$ 200
February, 1875, L. Larouqe, salary for January.... .. 100

And no salary of these officials is charged against this fund prior to January, 1875, but only thereafter.

From June, 1871, when the city took charge under the act of that year to January, 1875, she clearly was of opinion she had no right to charge this fund with these items. Did she have any right thereafter to make such charge? All will depend upon the provisions of said Act 30, of 1871, where her duties are declared. (Statutes, pp. 13 to 19.)

The act, after providing and describing the work to be done by the Mississippi and Mexican Gulf Ship Canal Company, in its ninth section, declares:

> "That in order to provide funds for the payment of *the work to be done by the said company.*"

(Which work clearly was the building of protection

levees and the digging of the canals in said act described.) Further declares that the various Boards of Drainage Commissioners, and all other parties having them in possession, should transfer all monies, assessments and claim for drainage in their hands, titles to real estate, all judgments, and in fact everything pertaining to drainage, to the Board of Administrators of the City of New Orleans, who were by said act subrogated to all the rights, duties and facilities of said Boards of Draining Commissioners, and said Board of Administrators was directed to collect the balance of assessments due on the books in the First and Second Drainage Districts, which were by said act confirmed and made exigible, *in time to provide for the payment of warrants to be issued to said company at the date of their issue*, and to make assessments of two mills per superficial foot on the remaining territory created under acts of 1858 and 1859, and on such other territory brought within the protection of the levees contemplated, where no previous assessments had been made, and that all money received by said board of administrators from said commissioners of the drainage districts, either from the sale of property received from said commissioners, from the collection of claims for drainage and from any of the sources of revenue contemplated by the provisions of said section of said act, should be placed to the credit of the Mississippi and Mexican Gulf and Ship Canal Company, and held as a fund *to be applied only to the drainage of New Orleans and Carrollton in accordance with the provisions of said act.*

We then have a fund created for a definite and specific purpose, but not to pay bookkeepers or clerks, but to pay for the work to be done by the Mississippi and Mexican Gulf Ship Canal Company, and the sole work with which they were charged, was the digging of canals and the building of protection levees, and the manner in which that payment for the work done by said company is to be made, and it is the only payment provided for in the eighth section of the act, as follows:

At the end of each month the City Surveyor examined the work done by the company during the month, and measured the width and depth of the canals or parts of canals dug and protection levees built, and certified to the number of cubic yards excavated and the number of yards of protection levees built during said month, and a certificate thereof was given by him to said company, and on presentation thereof to the Administrator of Accounts he was to draw a warrant (drainage warrant) on the Administrator of Finance, at the rates specified in the act, and these warrants it was the duty of the Administrator of Finance (Treasurer of the city), to pay on presentation to him, in case there were any funds in the city treasury to the credit of said Mississippi and Mexican Gulf Ship Canal Company, but if there were no funds then the date of presentation was to be endorsed on the warrant, and the same was to bear 8 per cent. interest per annum thereafter.

So there was absolutely no provision for or authority granted by the act of the legislature to pay sala-

ries of bookkeepers and clerks, and the fund was solely provided for the payment of the work to be done by Mississippi and Mexican Gulf Ship Canal Company in the drainage of New Orleans and Carrollton.

Perhaps, the question will be asked who was to pay the salaries of clerks and bookkeepers?

We will answer by asking who was to pay the Mayor and Board of Administrators, of the City of New Orleans, or the City Attorney, for the performance of the duties imposed on them by said act of the Legislature? Their salaries were already fixed by law; the additional duties imposed on them by Act 30, of 1871, were to be paid for by those salaries already provided for. In other words, their duties were increased but not their salaries, and so are the city's bookkeepers and clerks. An account, in addition to those already kept by the city's bookkeepers and clerks, was to be kept, but no additional kookkeeper or clerk was to be created. The duties of the drainage commissioners were shifted on to the City of New Orleans, and for the performance of those additional duties, no compensation is authorized or even hinted at in the act of the legislature.

In fact, if there were any doubts on this subject, it is clearly dispelled by the Supreme Court of Louisiana, in the case of Lacey vs. Waples and the City of New Orleans, 28 A., p. 158 (which will be more fully referred to hereafter.)

There the contention by Lacey was for the payment to him of the attorney fees, allowed by the act

of the legislature and the judgments of the courts in addition to the amount of tax assessed, for the services he had rendered as attorney, in procuring the identical judgments under which said fees were allowed and collected, but the court held that the services he had rendered were as the attorney for the City of New Orleans, and he was not entited to the amounts claimed.

Here was a specific fee allowed by the law and the judgment, and yet Lacey, the City Attorney, who conducted the proceedings, was not entitled to it.

How much less were the bookkepers and clerks of the City of New Orleans entitled to be paid from the drainage fund, which was provided solely to take up drainage warrants.

Surely there can be no doubt of the $52,006.65 being a misappropriation of the drainage funds as to all warrants issued prior to June 6, 1876, for work done, measured and accepted by the City of New Orleans, and outstanding and unpaid (of which there are about $360,000 exclusive of interest); and the various items of said $52,006.65 would bear interest at the rate of 6 per cent. per annum, from the date of each item of misappropriation.

We say it is a misappropriation as to the work warrants outstanding and unpaid on June 6, 1876, for, on that date, Van Norden sold and transferred the dredge boats and franchise to the City of New Orleans, under Act No. 16, of 1876, and in the act of sale, consented to the appointment of a book-

keeper and a collector, (Mayo and Guthrie were afterward selected) at certain salaries therein stated, to be paid out of drainage tax collections, and he undertook to bind not only the warrants he was to receive as consideration for said sale by the above provisions, but also all the warrants previously issued for work done and then outstanding, but he could not bind the outstanding work warrants by any such provision, or in any manner encumber them, because, as the master's report and the evidence show, they were beyond his possession and control, and in the hands of third parties. (Record, pp. 87, 507 and 508.)

But, suppose we are wrong as to the misappropriation of the entire sum of $52,006.66, can there be doubt that the various items of this drainage fund used to pay the Surveyor's roll of the City of New Orleans, are misappropriations, and which appears on the items of said account as follows: Record, pp. 458 and 459.)

| | | |
|---|---|---|
| 1875 — September 10, 1875. Pay roll, Surveyor, August | $ | 370 00 |
| " September 30, 1875. Pay roll, Surveyor, September | | 247 18 |
| " October 1, 1875. Pay roll, Surveyor, September | | 180 82 |
| " December 10, 1875. Pay roll, Surveyor, November | | 430 80 |
| 1876 — January 7, 1876. Pay roll, Surveyor, December | | 255 00 |
| " January 7, 1876. Pay roll, Surveyor, December | | 175 00 |
| Total | $ | 1,650 00 |

to which should be added interest at 6 per cent. per annum, from the date of each wrongful payment until 1st October, 1888, the date at which the statement, from which the above account is taken, is made up.

As before stated, on the 6th of June, 1876, the City of New Orleans, under Act No. 16, of the year 1876, became the purchaser of all the boats, tools and implements of the Mississippi and Mexican Gulf Ship Canal Company, and Van Norden transferee of said company, and thereafter, under said Act No. 16, became solely possessed of the right and charged exclusively with the duty of doing all dredging and canalling in the cities of New Orleans and Carrollton.

Surely, there can be no doubt that, after that date, the city could not lawfully charge the expenses of the collection of the drainage taxes against the drainage fund, and this was so well understood between the parties to the act of sale and transfer, to-wit: the company and Van Norden, transferee, and the city, that in said act both parties provided for the appointment of a bookkeeper at a salary of $200 per month, and a collector at a salary of $300 per month and a commission of 2½% on all sums collected (Record, p. 252), and the parties, as before stated, undertook to bind all the work warrants then outstanding, as well as the purchase warrants given for said dredge boats, tools and franchise.

As before stated, about $360,000 of the work warrants were then outstanding and in the hands of

third parties, and beyond the control of Van Norden and beyond his right or power to encumber them with the terms of the above agreement.

The amount of money wrongfully paid Mayo and Guthrie under that contract, as to said work warrants, according to the statement furnished by the City of New Orleans, between July 1, 1876, and October, 1888, to which date the account is made up, is $52,006.65 (Record, p. 466), to which should be added interest at 6 per cent. per annum, from the date of each payment to said 1st of October, 1888. (Record, p. 88.)

The balance of said $119,691.72, to-wit: $44,-118.27, is said to have been paid out for what is called Old Drainage Accounts, of which a statement is given, but what was the nature of the alleged debts or when they were contracted does not appear with perhaps two or three exceptions. (Record, pp. 466 and 467.)

The last item is dated September 30, 1871, and the last four items January 9, 1874, which aggregate $5,320.84, and it can hardly be presumed in the absence of explanations and direct evidence that these were payments for debts due by the drainage commissioners and contracted years previous to their payment, for the burden of proofs is on the city and she fails to make the proper explanations.

The name of John Clark appears three times during the year 1872, and once during the year 1873, and as payee each time of considerable sums of money. The first item is to John Clark for boilers,

and it is safe to presume the others were for similar purposes. All such charges for machinery, pumps and boilers, must have been to run the steam pumps, which, under section 6, of the Act 30, of 1871, are a charge against the City of New Orleans direct, and not against the drainage tax collections, as will be seen in the following:

> "The Board of Administrators are also required to build and run all the pumps and draining machines necessary to lift the drainage water from the said canal or canals, over into Lake Pontchartrain, and moreover, to keep the water in the canals in process of excavation, so far as practicable, at the proper level for the work of excavation, and at the same time assist the drainage of the adjacent lands. (Statutes, p. 11.)

There are two items of *cash* charged in this "Old Drainage Account," that are proven to be absolutely false. (Record, p. 467.)

The first is under date of September 30, 1871, 7:30, issued to Roselius and Phillips, being for 10 per cent. attorney's fees, Judgments vs. City $18,-971. This appears as so much cash paid out of drainage tax collections and is not true. This item was provided for by Ordinance 954, A. S. (Record, pp. 344 and 345), which provides for the issuance and delivery to Roselius and Philips of certificates of indebtedness, under Ordinance No. 882, which provided for the issuance of certain certificates to bear interest at the rate of $7\frac{3}{10}$ per annum to be held until the passage of a funding bill at the following session of the legislature, Under this ordi-

nance, certificates Nos. 4 to 22, inclusive, were issued and delivered to Roselius and Phillips. (Record, p. 473.) The next session of the legislature passed the funding bill (Statutes, pp. 13 to 15), providing for the issuance of bonds (interest at 7 per cent. per annum), to take up the floating indebtedness of the City of New Orleans and thereafter, as appears from the evidence of J. L. Newman, A. P. Harrison and the records of the City Hall (Rec., pp. 518 to 521), S. D. Moody and E. P. Boyer, surrendered the above 7:30 certificates, issued to Roselius and Phillips, and had issued to them in the place thereof warrants for the bonds provided for in said funding Act No. 73, of 1872, and the bonds were delivered accordingly. What right then has the City of New Orleans to charge *cash* against these drainage collections, when the payment was in bonds? This $18,971 is still in the drainage fund or some one has stolen it, and the city is chargeable with it, with interest at 6 per cent. per annum, from September 30, 1871.

On this same statement of old drainage accounts is an item of $4,444.44 cash paid Judge Walker (Record, p. 467), which is equally false, as will appear from the following:

The City of New Orleans has furnished a statement showing the amount of bonds of the Drainage Series issued, and the names of the parties to whom they were issued and delivered, and among them is this item of $4,444.44 bonds of the Drainage Series issued and delivered to Judge Walker (Record, p. 424), which is a second item falsely charged as cash, and

sought to be wrongfully taken out of the drainage funds collected. (Record, p. 88.)

This item is, likewise, still in the drainage fund or some one has stolen the amount thereof, and the city is chargeable with the amount thereof, with interest at 7 per cent. per annum from the date thereof, June 30, 1872.

Here are two items making together more than half the amount charged against the cash collections under the head of Old Drainage Accounts, which are proved to be absolutely false. In view of this showing by complainant, and in the absence of any explanation by the defendant, as to any of the items charged, can she, a trustee, when called on for an account of her administration, be allowed as to the other items, a credit for the amount thereof? and especially when half of the account is proved to be false, and not a voucher is produced showing the payment of any amounts.

Surely the city is responsible for the whole sum of $44.118.29, with 6 per cent. interest per annum from the date of each item.

*Misappropriation of amounts collected, as to attorney's fees:*

The amount of cash received by the City of New Orleans, as attorneys' fees, is stated in bulk at $29,-041.91 (Record, p. 435), the detail of which is given as follows:

From June, 1871, to July, 1876—

| | |
|---|---|
| First District | $ 7,448 76 |
| Second District | 3,094 10 |
| Third District | 6,620 35 |
| Fourth District | 2,354 70 |

And from July, 1876, to October, 1888, as follows :

| | |
|---|---|
| First District | $ 2,038 90 |
| Second District | 2,331 45 |
| Third District | 3,264 85 |
| Fourth District | 1,888 80 |

Which condensed stands as follows :

| | |
|---|---|
| First District | $ 9,487 66 |
| Second District | 5,425 55 |
| Third District | 9,885 20 |
| Fourth District | 4,243 50 |
| Total | $29,041 91 |

The court proceedings for each of these districts, which resulted in judgments homologating the tax rolls, decreed that the amounts assessed should be paid, with an addition thereto of 10 per cent. as attorney's fees.

The attorneys in the *First* Drainage District were Roselius and Phillips, during the time the drainage affairs in that district were in the hands of the Drainage Commissioners up to June, 1871, and they procured in the court the declaration of the mortgage on the land in that district, and also procured, in 1863, the judgment homologating the assessment rolls in that district, for the first installment of the assessment levied therein, being for an amount equal to 10 per cent. thereof. (Record, pp. 115 to 118.)

The subsequent judgment of homologation of the

rolls for the nine remaining installments was procured at the suit of the City of New Orleans, represented (as the extracts from the proceedings on file showed) by Rufus Waples, Assistant City Attorney. (Record, pp. 119 to 121.)

The attorneys in the Second Drainage District, both for the procuring of the judgment declaring the mortgage on the land and the procuring of the homologation of the assessment rolls for all installments were Roselius and Phillips, acting for the Drainage Commissioners in that district, and both of these judgments were rendered prior to the City of New Orleans becoming charged with drainage matters under Act No. 30, of 1871. (Record, pp. 144 to 153.)

In the third Drainage District all of the court proceedings ending in the judgment, declaring the mortgage on the land and the judgment homologating the assessment rolls were had at the suit of the City of New Orleans, and were also conducted (as the extracts from the records in evidence here show) by Rufus Waples, Assistant City Attorney of the City of New Orleans. (Record, pp. 169 to 172.)

In the Fourth Drainage District all of the proceedings, both for the declaration of the mortgage on the land and the homologation of the assessment rolls, were had at the suit of the City of New Orleans and were conducted by George S. Lacey, City Attorney. (Record, pp. 180 to 188.)

The question as to whom these 10 per cent. of attorney's fees collected in the Third Drainage District

belonged has been decided by the Supreme Court of Louisiana, in case of Lacey vs. Waples, and the City of New Orleans, reported in the 28th Annual, page 158, where the court decided that neither Lacey, the City Attorney nor Waples, his assistant, were entitled to said fees, and the consequence was that the same belonged to the drainage fund.

The same rule would likewise apply to fees collected for services rendered either by Lacey or Waples, his assistant, in the First Drainage District.

In the Second Drainage District, as all the services were rendered by Roselius and Phillips, as attorneys for the drainage commissioners, the attorneys' fees collected in that district clearly belonged to them.

In the Fourth Drainage District, under the above decision, the fees collected for the services rendered by the City Attorney in that district would likewise belong to the drainage fund.

There is in evidence a statement showing payments from attorneys' fees collected in the First Drainage District to George S. Lacey, the City Attorney, of $6,423.84 (Record, pp. 226 to 230), which, under the above decision, was a clear misapplication of drainage funds to that extent on which interest should be allowed from the date of each payment.

There is also in evidence a statement showing the collection of attorneys' fees in the Third Drainage District from June, 1875, to have been $7,502.57 (Record, pp. 225 and 226), and various alleged payments therefrom, leaving a balance of $4,448.77, now to the credit of that fund, exclusive of any interest due thereon.

The collection of attorneys' fees, however, in the Third Drainage District must have begun before June, 1875. In fact, the detailed statement of collections furnished by the City of New Orleans of the collections in the Third Drainage District shows the collection of attorneys' fees in this district began in March, 1873 (Record, p. 439), and continued to the time of making up the statement (October, 1888, Record, p. 450), and amounted to $9,885.20. (Record, p. 435.)

The partial statement above referred to, and which purports to show various payments out of said fund, with the above balance of $4,448.77, to the credit of the fund fails to show absolutely for what these alleged payments were made, and no vouchers are offered or even hinted at proving that any payment, legitimate or otherwise, was made at all.

But if it is to be held that said naked and unsupported statement could be construed into any payment at all it fails absolutely to show that any of that fund, which was a part of the drainage fund, was used in any way to take up drainage warrants or pay for the drainage of New Orleans and Carrollton—the *sole* purposes under the law for which the drainage funds could be applied.

Many of the payments as appears by said statement were made to James B. Guthrie after June, 1876 (Record, p. 225), who, as appears by the act of sale from the Mississippi and Mexican Gulf Ship Canal Company and Warren Van Norden, transferee, to the City of New Orleans, dated June 6th,

1876, was made collector of drainage funds at a salary of $300 per month and commissions, but, as before shown, at that time Van Norden did not have possession or even control of any of the $360,000 drainage warrants, given for work done by the company and Van Norden, and then outstanding, and he could, therefore, in no manner encumber them by any claim in favor of Guthrie or any other party.

Clearly the city of New Orleans is responsible to the drainage fund for this entire sum collected as attorneys' fees in said Third District, say $9,885,20, as shown by the city's statement (Record, p. 435), with interest from the date of each payment, also for the sum collected in said Fourth District, $4,243.50 (Record, p. 435), with interest from each payment, also for the sum paid Geo. S. Lacey, City Attorney, in said First District $6,423.84, with interest from the date of each payment.

But the foregoing are not the only amounts of misappropriation the city should be charged with. As already shown, the commissioner in the First and Second Drainage Districts collected $334,941.62 of taxes before the transfer to the city in 1871. No proof has been offered tending to show how this sum was expended, except about $117,000, leaving a balance of $218,903 unaccounted for (Record, pp. 75, 610 and 588), though it was the duty of the city to require from commissioners, by suit or otherwise, to account for and deliver all monies not accounted for and used by said commissioners for drainage. (Statutes, pp. 11 and 12.)

Surely there can be no doubt that the City of New Orleans is responsible [apart from her obligation to issue bonds of the "Drainage Series" for excavations], by reason of judgments rendered against her and now unpaid, by reason of her disregard of her duty in collecting the assessments against individuals, and especially by reason of her conduct in rendering said assessments at the present time uncollectable because of the non-completion of the drainage system as well as by reason of her misappropriation of drainage taxes collected and misapplied to the drainage fund for the entire amount of the assessments and interest, save only the $23,666,59 [Record, pp. 435 and 466], of money collected and used to take up and pay drainage warrants, and perhaps for the amount of assesments collected or paid in drainage warrants, as well as for said $218,903, she should have received from the drainage commissioners in the First and Second Districts at the time of the transfer from them to the city in 1871.

And in their efforts to enforce the payment of drainage warrants the holders thereof have ever been vigilant, 33 La. A., p. 64, 35 La. A., p. 68 (Record, pp. 543 to 550 and 551 to 558, 558 to 585, 201 to 212, 483 and 484 and 523 to 524.)

All the evidence taken by the master (who had previously acted as examiner) was reported with his findings, which were substantially in favor of the positions assumed herein, but they were disregarded and unnoticed by the court. (Record, pp. 782 to 787.) This was improper practice. Modsker vs. Bonebrake, 108 U. S., p. 71.

The effect to be given to a master's report is thus stated by the United States Supreme Court in 125 U. S., page 149 :

> "We are brought to a consideration of the exceptions taken to the master's report affecting the accuracy of the conclusions in respect to the amount of these profits, gains and savings. In dealing with these exceptions, the conclusions of the master depending upon the weighing of conflicting testimony, have every reasonable presumption in their favor, and are not to be set aside or modified unless there clearly appears to have been error or mistake on his part. 108 U. S., 66 ; 2 Sumner 366, 371 ; 3 Wood & Minot 258, 269 ; 104 Mass. 521, 531 ; 127 Mass. 167, 172.

In Modsker vs. Bonebrake, 108 U. S., the Court said :

> "The finding of the master is *prima facie* correct. Only such matters of law and of fact as are brought before the court by exception are to be considered, and the burden of sustaining the exception is on the objecting party. See also 1 Stockton 309 ; 14 Vroom 514 ; 5 Gray 423 : 3 C. E. Green 141 ; 1 C. E. Green 583 ; 2 Daniel Chancery 1229.

A decree should be made confirming the master's report, and the case should then be referred back to the master in accordance with the practice indicated in Johnson vs. Waters, 111 U. S. R., pages 673, 674 and 675, to give notice to all parties owning drainage warrants to appear before said master within a given time and make proof of the same, and thereafter he should report the amoumt proved and the owners thereof and then decrees should be rendered in favor of such owners respectively against the de-

fendants for the amounts proved with interest and cost.

V.

No 780.

5th. There was error in the judgment of the lower court, holding that Ordinance No. 814, adopted April 24, 1871, as ratified by section 13 of Act No. 73 of 1872, did not, with Act No. 30, of 1871, constitute a contract, that provided means to pay the cost of the entire system of drainage contemplated in said Act 30, of 1871, and drainage laws previously enacted which could not be impaired by the constitutional amendment of the State going into effect on January 1st, 1875, and that plaintiff was not entitled to recover judgment payable in 7% Gold Bonds "Drainage Series," of the City of New Orleans.

In view of all that has already been said on said contract and the alleged payment of the judgments against the City of New Orleans, nothing further need be added than to say that the drainage warrants sued on in suit No. 780 do not in any manner embrace the contract between the Canal Company and the subsequent holder of the warrant given the Canal Company, but are only the evidence, proof of, and voucher for, the work done under that contract.

In this light the city and the Canal Company always regarded them, for as already shown the machinery, or circumlocution adopted in issuing the bonds, for excavations &c., was first to issue the drainage warrants, then surrendered them and re-

ceive a bond warrant on the giving of a receipt in full of the drainage warrants, and then surrender the bond warrant and thereupon to receive the bond of the "drainage series".

The right to pay for the canals and excavations represented by the drainage warrants is clear, and there is no legal impediment to their issuance. The only limit to said issuance is contained in the 13th section of said Act No. 73, of 1872, and was when the city debt reached $23,000,000 (Statutes, p. 14) which was never reached. See statements of the city debt between pages 384 and 385 of Record.

The work (our part of the contract) was done, measured and accepted by the City of New Orleans, and the warrants were given in proof thereof. We now ask the court to compel the city to complete its part of the contract and deliver the 7% Gold Bonds, in satisfaction of her part of contract.

But suppose there is no contract in Ordinance No. 814 and the 13th section of the Act No. 73, of 1872, providing for the issue of the above bonds. Still said section 13, has never been repealed, and is and was at the begining of said suit No. 780 in full force.

The constitutional amendment going into effect on January 1st, 1875, (Statutes, pp. 22 and 23) does not repeal it or even refer to it. It merely provided that the City of New Orleans should not after that date increase her debt, but says nothing about the repeal of any law.

The most that can be claimed for the amendment,

is that it suspended the operation of section 13 of said Act No. 73, of 1872, if it did anything.

The above constitutional amendment remained in force until the adoption of the present constitution of the State, the 253d Article of which declares: "The Constitution of this State adopted in 1868, "and all amendments thereto, is declared to be sus- "pended by this Contitution &c."

But in the Constitution of 1879, there was no provision prohibiting the increase of the debt of the City of New Orleans. The adoption of the Constitution of 1879 removed the above restriction, on the 13th section of Act No. 73 of 1872, and hence gave full force to the provision for the issuance of the bonds of the "Drainage Series" which had been merely suspended by the amendment of 1875.

The court in its decree (suit No. 1234), Record, pp. 779 and 780, makes its opinion a part thereof, and because said opinion (Record, pp. 782 to 787), purports to have the entire sanction of both judges, we have deemed it proper, because of the grave errors of fact and law therein contained, to write and print a special examination and review thereof, (as a separate brief) and to ask the court's special attention thereto.

Respectfully submitted,

RICHARD DEGRAY,

*Counsel for Appellant and Plaintiff in error.*

(NOTE.—The master, in his statement of statutes relating to drainage (Record, pp. 53 to 56), sets out at length Act No. 51, of the year 1869, but we have not printed this statute because this act, with Act No. 16, of 1870, were set up and relied upon by W. O. Denegre and P. Irwin (Record, pp. 414 to 417), as a defence and opposition to the homologation of the assessment rolls in the First Draining District, but this defence, with all others, were overruled by the court, 27 A., p. 20, and hence neither of the above statutes cut any figure in the case.

FILED
MAY 2 1890
JAMES H. McKENNEY
Clerk

# Supreme Court of the United States.

*OCTOBER TERM, 1889.*

No. 1234.

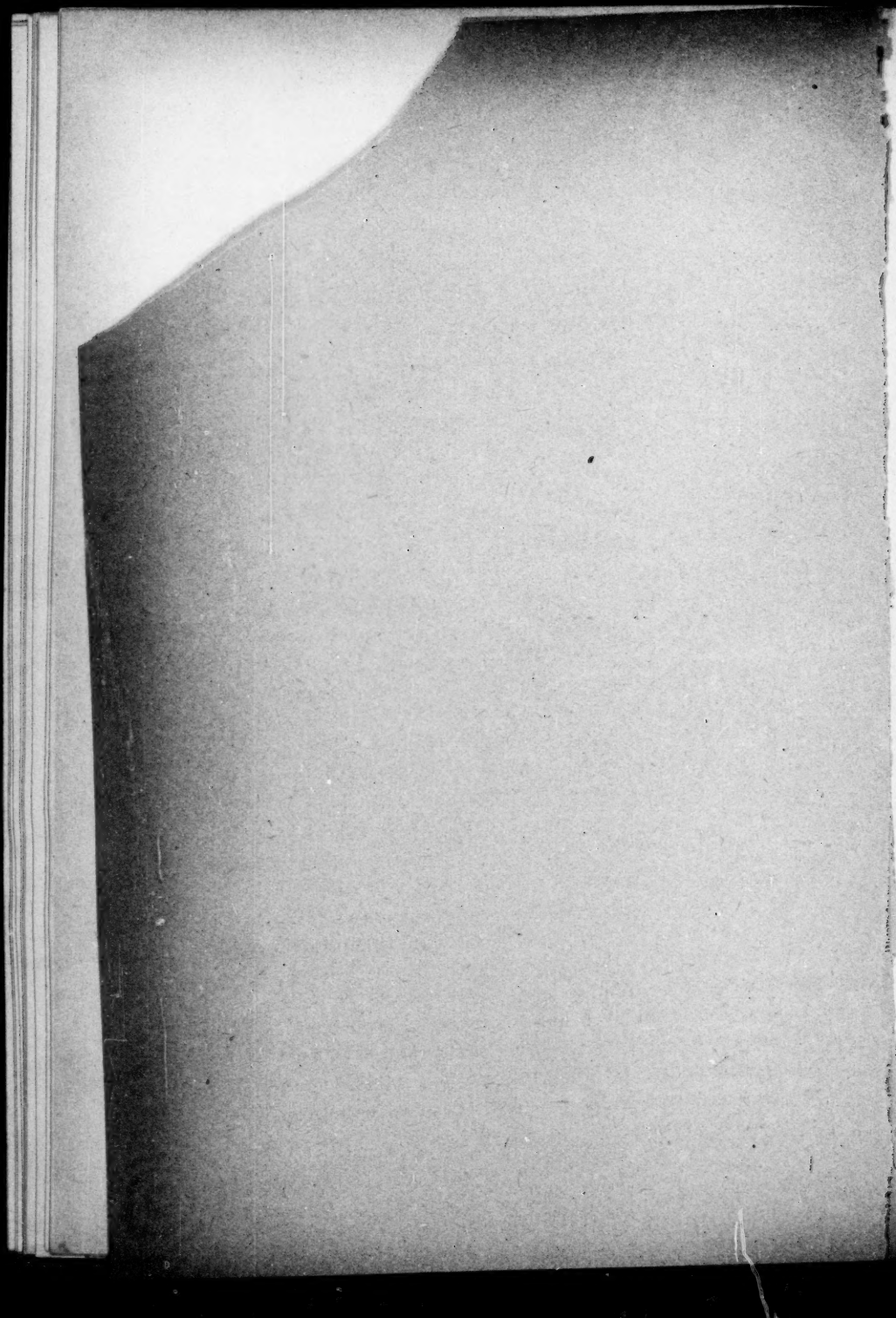
JAMES WALLACE PEAKE

*versus*

THE CITY OF NEW ORLEANS.

THOS. J. SEMMES,
*of Counsel for Appellants.*

A. W. Hyatt, Print, 73 Camp St., N. O.—19460.



# Supreme Court of the United States.

*OCTOBER TERM, 1889.*

No. 1234.

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JAMES WALLACE PEAKE

*versus*

THE CITY OF NEW ORLEANS.

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By acts of congress, approved 2d June, 1849, and 2d September, 1850, the swamp lands in Louisiana were donated to the state to aid it in draining them.

The state constitution of 1852, art. 128, provides "that none of the lands granted by congress to the state of Louisiana for aiding it in constructing the necessary levees and drains to reclaim the swamp and overflowed lands in this state shall be diverted from the purposes for which they were granted."

Act of the legislature of Louisiana, No. 133 of 1854, divides the state into four "levee and draining districts." New Orleans was in the first district, which included that part of the state south of the thirty-first degree of north latitude and east of the Mississippi river. A commissioner was appointed for each district, and the four commissioners constituted a board, under whose supervision all draining and levee work was to be performed, and the proceeds of the sales of swamp lands donated by congress were to be applied to the payment of the work done.

This system did not suit the people of New Orleans and its suburbs, and hence the area described in the drainage act of March 18, 1858, was by that act withdrawn from the control of

the state board of drainage commissioners and divided into three drainage districts, and a separate board of commissioners was appointed for each district; and inasmuch as this area was entitled to participate in the benefits resulting from the donation of swamp lands to the state, the act of 1858, section 11, appropriated out of the swamp land fund of the first swamp land district the sum of $81,000 to aid in carrying out the object of the act, the sum so appropriated to be equally divided among the drainage districts established by that act, and in proportion to the area of each district to be drained.

This area was thus withdrawn from the control of the state board of commissioners, because it was urban property and embraced the city of New Orleans and the city of Carrollton and the intervening territory in the parish of Jefferson.

The drainage of New Orleans and its protection from overflow could not be made effective, without including in the system the city of Carrollton and other portions of the parish of Jefferson (suburbs of New Orleans) lying between that city and Carrollton.

Hence, when the act of 1871 was passed, vesting all drainage authority in the Board of Administrators of New Orleans, and turning over to them all the property, assessments and assets belonging to the three districts created by the act of 1858, the legislature required the city authorities to drain the entire area embraced in the act of 1858, and to pay the expense thereof, and authorized the city of New Orleans to retain any surplus which might remain.

The system of area taxation for drainage purposes had been tried by a company incorporated by an act of the legislature in 1835, of which company the city of New Orleans was a large stockholder.

That company taxed every foot of land within the area drained, whether it was owned by the city or private individuals, and whether it was dedicated to public use as a street or other-

wise. In the litigation which ensued the Supreme Court of Louisiana, in 1856, distinctly held that the streets of the city were subject to to the drainage tax, although not specifically named in the act of the legislature authorizing the tax.

The court say that "the large portion of the expenses which by this view is thrown upon the city for streets meets in some measure that equity, which has been urged upon our consideration: that, as this work has been undertaken for the public good, the public ought to bear the charge of it, notwithstanding the benefit to the owners of the soil."

Draining Company, praying, etc., 11 A. 377.

In the report of that case nearly all the sections of the act of 1835 are quoted in full (pp. 341, 346). An examination of them will show that nearly all the machinery of the acts of 1858, 1859 and 1861 was derived from the old act of 1835, and in many instances the language of the act of 1835 is used in the subsequent acts. This act required the draining company, after the completion of the work and the ascertainment of the amount of its cost, to file a tableau, assessing "on each individual property such portion of the amount of the aforesaid account of the drainage company as will appear to them in due proportion, in such a manner that the amount of their assessment will be equal to the amount of said account." 11 A. 343.

The previous section provided for the establishment of a lien and privilege on the property within the area to be drained in language almost identical with that used in section 7 of the act of 1858, page 342.

The act of 1835, like that of 1858, required the draining company, when prepared to drain a section, "to have a plan thereof made, accurately designating the limits of the said section, and as much as possible the *subdivision of the property* therein ascertained, and the *names of the proprietors*, and also of the direction and dimensions of the canal intended to be dug, and the place where the steam engine, if any, will be established." 11 A. 342.

It then provides for the deposit of the plan in a notary's office and publication of notice, and thereafter the filing of a petition in court; and on proof of the publication the court "shall decree that each portion of the property situated within the said limits is subject to a first mortgage in favor of the said draining company for such amount as may be assessed on it for its proportion of the whole cost of draining said section." It then proceeds to provide for registration of the decree, which shall thereafter be a privilege and first mortgage for such sum of money as will be thereafter assessed on said property for the draining thereof.

Under these circumstances I consider that the liability of the city to be assessed for drainage, as proprietor of streets and public buildings, is conclusively settled by the decision of the Supreme Court of Louisiana in 11 A., page 343.

No one seems to have entertained any doubt on this subject.

In the first draining district an assessment of three mills and three-tenths upon each superficial or square foot was levied by a resolution of the drainage commissioners adopted 12th September, 1861. Page 113. Proceedings were instituted to collect one-tenth of said assessment in 1863. Page 117. The city resisted these proceedings and took an appeal to the Supreme Court, but she abandoned her appeal. Pages 374, 375, 385. No resistance was made thereafter; on the contrary, the balance of the assessments in the first draining district were enforced at the suit of the city itself, as appears by the petition filed by the city attorney 7th December, 1871. Page 119.

Some of the taxpayers of the first district endeavored to defeat the proceedings of the city in this last mentioned suit; the litigation resulted in a judgment in favor of the taxpayers by the inferior court on 15th April, 1872, which judgment was reversed by the Supreme Court of Louisiana in 1874, on appeal taken by the city. Pages 119–122. The case is reported in 27 A. 20.

In the second drainage district an assessment of two mills, payable in ten annual instalments, was levied by the drainage commissioners March 11, 1861 (page 113), and a suit instituted by the commissioners in 1868. Judgment was rendered homologating the assessments for lands in the city of New Orleans, November 11, 1868, and for lands in the parish of Jefferson, March 23, 1869. Pages 148 and 159.

In the third drainage district the assessment was levied by resolution of the city itself, June 11, 1872 (page 114), and on a petition filed by the city a judgment homologating the assessment was ordered November 13, 1872. Page 172.

The fourth drainage district was established by a resolution of the city passed pursuant to the authority vested in it by the ninth section of the act, No. 30 of 1871. Page 111.

Thereupon the city instituted proceedings to subject the lands within the fourth district to the payment of an assessment of two mills (page 180). This assessment was also homologated at the instance of the city, and a judgment to that effect was rendered February 10, 1873. Pages 186–7.

On all the assessment rolls in all the drainage districts the streets, public squares and public buildings were assessed as the property of the city, and as such subjected, like all other property, to the payment of the drainage tax.

The constitutional amendment which went into effect July 1, 1875, caused the city to stop the issue of bonds in payment for drainage work; thereupon the contractor, Van Orden, instituted suit to compel the city to collect the drainage tax in the first, second, third and fourth drainage districts by the issue of writs of execution on the judgments rendered on the homologation of the assessment rolls in each of those districts.

A final judgment against the city was rendered by the Supreme Court of Louisiana in May, 1875. (See 27 La. A. 497).

The court, of course, did not order the city to issue writs of execution against itself; indeed the statute of 1870, No. 5, extra

session, page 10, provides that "hereafter no writ of execution or fieri facias shall issue from any of the courts of this state against the city of New Orleans to enforce the payment of any judgment for money against the city of New Orleans;" and it then proceeds to provide for a method of registration of judgments with the comptroller, and their payment out of certain moneys set apart for that purpose in the annual budget of city expenses.

But the judgment of the Supreme Court of Louisiana in 27 A. 497 recognized the regularity of the assessments in all the drainage districts, as well as the validity of the judgments rendered thereon.

When we add to this accumulation of law and evidence the legislative declaration in the act No. 30 of 1871, "that said assessments are hereby confirmed and made exigible," it seems to us the validity of the assessments and of the judgments thereon is put beyond controversy.

Even the judges who heard the case in the circuit court would not undertake to say that the assessments against the city were not valid.

We have, in support of our view of the case on this point, a powerful combination of law and fact.

We have the judgments of the Supreme Court of Louisiana in 11 A. and in 27 A.

We have the practice of all parties concerned since 1858.

We have the conduct of the city—evinced by resolutions and by judicial proceedings and by judicial admissions.

We have a legislative confirmation and approval of the course pursued by those charged with the duty of assessing drainage taxes.

Where the state of Louisiana had made an act of the legislature the basis of a suit, and thereby by implication admitted the act to be constitutional, it was held, that in a subsequent suit between different parties the state could not question the constitutionality of that act.

State ex rel. Newgass vs. Board of Liquidation, 28 A. 12.

The same doctrine is enforced in State vs. Taylor, 28 A. 462.

A judge who renders a judgment which is an absolute nullity for want of jurisdiction in the court over which he presides, is estopped to assert the nullity of such judgment.

Osborn vs. Legras, 29 La, A. 294.

Jones vs. Morgan, 6 La. A. 631

What then is to be said of the city of New Orleans, which institutes suits, and procures judgments from the courts, subjecting the public property which she administers and represents to the payment of taxes? Can the city be heard to say that these judgments are void?

The plea of payment in this case is absolutely inconsistent with the contention that the debt never existed.

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But it is urged that the debt for taxes created by the assessments and the judgments thereon has been paid.

It is not pretended that the city paid the judgments in money, but it is contended that such payment was made by the delivery of bonds to the contractor in *payment of work done by him.* There is not a particle of evidence indicating any intention on the part of the city authorities to pay the tax judgments against her. On the contrary, the evidence tends to the opposite view.

In Dodge vs. Freedman Savings Company, 93 U. S. 386-7, the court adopts the views of the Supreme Court of New York in Keystone Bank vs. Fay, 21 Barb. 459. In that case, say the court, "the principle was laid down that, to constitute payment, money or some other valuable thing must be delivered by the debtor to the creditor for *the purpose of extinguishing* the debt, and *the creditor must receive* it for the same purpose."

In the case of the Queen vs. Ashwell, 16 Q. B. Div. 224, Lord Chief Justice Coleridge, in speaking of the delivery and

receipt of things, says: "But then it seems to me very plain that delivery and receipt are acts into which mental intention enters, and that there is not in law, any more than in sense, a delivery and receipt, unless the giver and receiver intend to give and receive respectively what is respectively given and received. It is intelligent delivery, as I think, which the law speaks of; not a mere physical act from which intelligence and even consciousness are absent. I hope it is not laying anything down too broad or loose when I say, that all acts, to carry legal consequences, must be acts of the mind; and to hold the contrary; to hold that a man did what in sense and reason he certainly did not; that a man did in law what he did not know he was doing and did not intend to do—to hold this, is to expose the law to very just but wholly unnecessary ridicule and scorn."

It is intent, an act of the intelligence, which gives legal character to the act, for, as was said in Ketchum vs. Duncan, 96 U. S. 662, how can there be a sale without an intention to sell? And, I may ask, how can there be a payment without the intention to pay? Wood vs. Guarantee Co., 128 U. S. 424; Bloodworth vs. Jacobs, 2 La. A. 26.

Mr. Alfred Shaw, the administrator of public accounts, in his report to the city council, July 1st, 1872, says that the city had already issued certificates for $485,081 of the new consolidated bonds, drainage series, not including payments due for August, about $41,500, and the work is going on at the rate of $42,000 in bonds per month. He then gives an account of the assessments in each draining district and of amounts uncollected. In the recapitulation he states the amount due by the city for streets, etc., to be $763,378.69, the total amount originally assessed against the city. If the $485,081 of bonds issued for work done had been considered a payment in part of the assessments against the city, this report would have so stated, and the debt due by the city for assessments would have been reported

as amounting to $258,297.69, instead of $763,378.69. Pages 468, 472.

At the date of this report, although the assessments against the city had been made in all the drainage districts, judgments had been rendered for only $215,686.20. Subsequently additional judgments against the city were rendered in the third district, 8th of November, 1872, for $205,026.70, and in the fourth district, 15th of March, 1873, for $65,956,72, making in all $420,712.99.

If the bonds issued for drainage work, which, up to November 8, 1872, amounted to $573,830.13, were intended to be in payment of assessments, why did the city allow judgments to be rendered against her on November 8, 1872, and March 15, 1873, for assessments in the third and fourth drainage districts, when the amount of bonds issued by her up to November 8, 1872, was $573,830.13 (pp. 430-1), and up to March, 1873, $701,349.42 ?

And why did the city allow on March 21, 1874, a judgment for the nine installments of the tenth drainage district for $231,163.51 when the amount of bonds issued at that time was $1,129,529.21 ?

When the mandamus suit was instituted in 1875 to compel the city to issue writs of execution, the mayor, on February 11, 1875, furnished and filed a statement of the drainage taxes, paid and unpaid, in which he sets forth that out of a total sum of $1,237,000 assessed the city had collected $119,000, and that there was then due by individuals $786,000 on improved lands and $342,000 on swamp lands, and that the city owed $701,000. Page 335.

It is manifest that neither the mayor nor the fiscal officer who prepared the statement for him, had at that time imputed the million and a half of bonds which had been issued, to the payment of the assessments or of the judgments.

As late as 1879 the city filed a suit in the Second Judicial District Court for the parish of Jefferson to revive the judgment

which had been rendered by that court in 1869. No intimation is given in the petition that the city is entitled to any credit for payments made, and the judgment was actually revived by a decree rendered at the instance of the city, April 18, 1879 (page 155). Payment is a good defence to a suit to revive a judgment.

Morbery vs. Pace, 30 La. A. 1331.

A petition was also filed in 1878 by the city to revive the judgment on assessments for that part of the territory of the second drainage district lying within the limits of the city of New Orleans (pages 165–7). There is no intimation in the petition filed by the city attorney that the city is entitled to any credit on the amount of the judgment against her (page 167). A similar petition was filed in 1882 by the city to revive the judgment homologating the assessment in the third drainage district; there is in it no intimation of a credit on account of any payment made by the city. Pages 178 and 179.

John Crossley & Sons, limited, filed a bill, August 24th, 1883, in the Circuit Court of the United States, at New Orleans, to have a receiver appointed to collect the judgments for drainage taxes, and in answer to said bill the city never pretended that the judgments against her had been paid; she attacked them on other grounds. Page 573.

The idea of payment never occurred to the city officials until the answer was filed in this case, 19th of March, 1888.

But it is urged that if the plea of payment cannot be sustained the city is entitled to offset the amount of bonds issued by her in payment of drainage work against her liability on the assessment judgments.

None of the drainage warrants outstanding were given prior to January 1st, 1875. At that time the city claimed that the constitutional amendment deprived her of all authority to issue bonds to pay for drainage work. Therefore her only source from which to make payment was drainage assessments. When the mandamus was applied for in 1875 to

enforce payment of those assessments, she made a statement, through her mayor, to Van Orden, the suing creditor, that the amount due and unpaid on the assessment judgments against her amounted to $701,000 (page 35). After that Van Orden proceeded with the work until he sold out in 1876, and he executed the work and accepted drainage warrants for it, and for the boats and machinery sold in 1876 on the faith of such statement or representation.

Is not the city estopped to set up now either the payment of those assessments or any offset against the same?

At the time these warrants were issued it was well known they could not be paid in cash; it was well known that the contractor was obliged to sell or pledge them in order to raise funds. The ordinance which authorized the date of presentation to be endorsed on the warrants, and provided for the payment of interest from that time (when the bond source was dried up) evidently contemplated that Van Orden would negotiate or dispose of the warrants.

As against third persons who took the warrants under these circumstances, the city is estopped to set up her alleged offset. I do not assert that the warrants were negotiable paper, but that the city is estopped to set up her alleged counter claim.

In Rumford Canal Co., 24 Ch. Div. 92, Mr. Justice Kay says:

"I understand the law as at present settled, or perhaps I should rather say developed, thus: where a company have power to issue securities an irregularity in the issue cannot be set up against even the original holder, if he has a right to presume *omnia rite acta.*

"If such security be legally transferable, such an irregularity—and *a fortiori* an equity—against the original holder cannot be asserted by the company against a *bona fide* transferee for value, without notice.

"Nor can such equity be *set up against an equitable transferee,*

whether the security was transferable at law or not, if by *the original conduct of the company in issuing the security, or by their subsequent dealing with the transferee,* he has a superior equity."

He cites as authority for the proposition last mentioned *In re.* Agra Bank, L. R. 2 Ch. App., 391; *In re.* Blakely Co., L. R. 3 Ch. 154; Dickson vs. Swenson, L. R. 4, Q. B. 44.

*In re.* Agra Bank, L. R. 2 Ch. 396, Lord Justice Cairns said: "Generally speaking a chose in action assignable only in equity must be assigned subject to the equities existing between the original parties to the contract; but this is a rule which must yield when it appears from the nature or terms of the contract that it must have been intended to be assignable free and unaffected by said equities."

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But is this a case where a trustee has paid out of his own pocket sums of moneys for account of the trust, and therefore is entitled to repayment out of the trust fund?

Every bond which is issued under section 13 of the debt consolidation act, No. 73 of 1872, "for the excavations and levees authorized by act No. 30 of 1871, or by drainage laws previously enacted," was marked "Drainage Series," and the act provided that "all taxes collected for drainage and not required for the payment of drainage warrants shall be devoted to the purchase from the lowest bidder of bonds issued for drainage."

The terms of this act show that none of the bonds were to be paid out of the drainage taxes—the trust fund—until all drainage warrants were taken up. In other words, the act of 1872 did not interfere with the provisions of the act of 1871, which directed the trustee to place all moneys received from the collection of drainage assessments to *the credit of the Mississippi and Mexican Gulf Ship Canal Company, and hold the same as a fund* to be applied only to the drainage of New Orleans and Carrollton *in accordance with the provisions of this act,*" etc.

The act of 1872 utilized this trust fund, to retire drainage bonds to the extent of any surplus, which might remain after payment of the warrants; but the warrants were a first lien on the fund, to which the claim of the bondholders was subordinate. It was so made by the statute. Yet the city having taken up the bonds, now claims that she is entitled to be paid in preference to the warrant holders, for that is the effect of allowing her to pay in bonds the assessments against her.

The counsel for the city in his brief, page 52, in speaking of ordinance No. 814, says: "That ordinance did not purport at all to assume the cost of the work as designated by act 30 of 1871. It was provided that if the drainage company would work *under the ordinance* the city would pay in bonds for the work thus done. But the city reserved the right to determine the work to be done, and to stop whenever it was deemed expedient. The ordinance therefore was not an assumption by the city of the whole or of any part of the work under the *legislative* scheme, but was an expressed and distinct repudiation of the whole of that scheme, and a proposal that in lieu of it, the contracting company should do only such work as the city desired and be paid in the manner proposed by it."

If this argument be correct then it is clear that all the bonds issued prior to January 1, 1875, to take up the warrants delivered to the contractor in the form prescribed by ordinance No. 814, were not issued in payment of *legislative or statute work*, but in payment of ordinance work, that is to say, of work done under a void ordinance. The drainage assessments were appropriated, by the act No. 30 of 1871, to the satisfaction of warrants to be drawn in payment for work done under the provisions of that act. How, then, can it be contended that bonds issued by the city to pay its own debts, contracted under its own ordinance, can be used as an offset against a debt due by it to a fund which it holds, as trustee, for other persons and other purposes?

In endeavoring to escape liability under the contract contained in ordinance No. 814 the city undermines its defence of payment and offset set up in this suit.

The counsel for the city also contends, that the act of 1861 has been repealed by act No. 51 of 1869, and that the assessments laid under it disappear with the act. All questions as to the effect of the act of 1869, as well as the effect of act No. 4 of 1870, were presented by oppositions filed in the suit praying for the homologation of the assessments on lands in the first drainage district, and these questions were disposed of by the Supreme Court of Louisiana in 27 A., p. 20. In that case, after disposing of the main difficulties presented, the court says: "There are other grounds of opposition, but they have not been urged before us, and we find nothing in them demanding attention." P. 23.

The other grounds referred to are set forth in the oppositions filed by Davidson (record, page 417, by Denegre, page 414 and by Irwin, page 415).

In all these oppositions it was alleged that the previous legislation on drainage had been repealed by the acts of 1869 and 1870.

But a most satisfactory answer to the contention of the city as to the effect of these acts is, that there is no averment in the answer to justify any such contention.

Respectfully submitted.

THOS. J. SEMMES,

*of Counsel for Appellants.*

Supreme Court U. S.
FILED,
OCT 6 1890
JAMES H. McKENNEY
CLERK

# Supreme Court of the United States.

OCTOBER TERM, 1889.

No. 1,234.

JAMES WALLACE PEAKE,
*Appellant.*

*vs.*

THE CITY OF NEW ORLEANS,
*Appellee.*

## BRIEF FOR APPELLANT.

GROVER CLEVELAND,
*Of Counsel for Appellant, and for* JOHN CROSSLEY & SONS, Limited, *Holders of Drainage Warrants.*

Evening Post Job Print, N. Y.

# Supreme Court of the United States.

No. 1,234.

JAMES WALLACE PEAKE,
*Appellant and Plaintiff in Error,*

*vs.*

THE CITY OF NEW ORLEANS.

**Appeal from the Circuit Court of the United States, for the Eastern District of Louisiana.**

## BRIEF FOR APPELLANTS AND PLAINTIFFS IN ERROR.

The bill in this cause was filed by James W. Peake in his own behalf, as the holder of certain warrants issued by the City of New Orleans, as well as in behalf of other parties similiarly situated, praying an accounting by said city concerning a certain fund made up of taxes and assessments for drainage, called a drainage fund, from which said warrants were to be paid (Record, pp. 1 to 19). A judgment on the law side of the Court, and referred to in the bill in this cause, was recovered by Peake upon certain of said warrants held by him in an action against the City of New Orleans, on the 20th day May, 1887; and it was thereby adjudged that he recover

of the defendant, the City of New Orleans, the sum of six thousand dollars, and interest from July 9, 1875, with costs, both recovery and costs to be paid out of the fund above referred to. The pleadings, judgment and the execution issued and returned upon said judgment will be found from page 201 to 213 of the Record.

The defendant first demurred to the bill (Record, p. 20), and the demurrer having been overruled (p. 22), an answer was interposed (pp. 22 to 27).

A reference was thereupon ordered to a Master to settle and report what amount, if any was due from the defendant to the said fund, including any and all items of indebtedness and of payment (p. 29).

In his report the Master finds and decides that the defendant is indebted in a large sum to the said drainage fund, for which it should account to the holders of warrants drawn upon said fund (pp. 49 to 94.)

The said Master, among other things, finds that nearly seven hundred thousand dollars has been assessed as taxes against streets, public places, and lands and property owned by the City of New Orleans and the cities of Jefferson and Carrollton (afterwards consolidated with the City of New Orleans), which sum should have been paid by the city into said drainage fund (Record, p. 57; p. 81, fol. 159; finding 9, p. 85, and finding 24 on p. 92); and that the said sum has not been paid by the issue of the city's bonds as claimed, or otherwise (Record, p. 68, fol. 132; p. 78, fol. 153; finding 10 on p. 85, and finding 22 on p. 91).

The Master also finds that the defendant, the City of New Orleans, is indebted to said drainage fund in a large sum for taxes assessed against other parties which it was its duty to collect and pay into said fund, but which it has neglected to do (Record, finding 6, on page 75; finding 8, on page 76, and pp. 79, 81, 84, 85, 86, 93).

He also finds that certain payments have been improperly made by the defendant from said fund for which it is liable to the holders of said warrants (p. 88).

The Master further finds that, by the failure of the defendant to prosecute to completion certain drainage

work which it was its duty to do, and by allowing such work as had already been done to become useless and of no benefit, a large amount of the taxes levied upon the property of individuals to pay for such work, and which should have been paid into such drainage fund, became uncollectible, to the loss and damage of the holders of such drainage warrants (Record, pp. 80, 81, 83, 84, 90, 92, 93).

The defendant's exceptions to the Master's report will be found at pages 95 to 102 of the Record.

The decree of the Circuit Court dismissing the complainant's bill will be found on pages 779 and 780 of the Record.

The opinion of the court will be found in the Record from page 782 to 787.

The appellants allege error in the following decisions and rulings of the Circuit Court:

1st. That all assessments against the City of New Orleans for drainage taxes, if any such assessments were valid, have been paid by the issue of its bonds in satisfaction of drainage warrants.

2d. That there has been no neglect or misconduct on the part of said city in the collection of drainage assessments against other parties for which the city is liable to the drainage fund or to the holders of drainage warrants.

3d. That the City of New Orleans has reimbursed and paid all misapplication of drainage funds by the issue of its bonds in excess of the amount necessary to pay assessments against said city.

4th. That the City of New Orleans was not at fault in failing to continue and complete the drainage work, for the prosecution of which outstanding drainage warrants were issued.

## Statement of Facts.

A careful and full recital of the facts involved in this cause will be found in the Master's report from page 49 to page 71 of the Record.

An act of the Legislature of the State of Louisiana was passed on the 18th day of March, 1858, entitled "An Act to provide for leveeing, draining and reclaiming swamp-lands in certain portions of the parishes of Orleans and Jefferson" (Statutes, page 1 to 5.)

This act established by metes and bounds three draining districts and provided for the appointment of a Board of Commissioners in each district. They were invested (section 4) with all the rights and powers necessary to thoroughly drain the said draining districts, were permitted to enter upon the lands within their districts, to dig all necessary canals and drains, make all necessary embankments and levees, and do all things lawful to be done which might "be useful and necessary in draining, clearing and reclaiming the land within said districts." They were also authorized to cut their canals and drains through streets and squares; and if any street selected for the location of a canal was too narrow for a draining canal and a public highway, the Commissioners might cause said streets to be widened.

It was further provided (sec. 7), that whenever either of said boards should be prepared to drain their respective districts, such boards should cause a plan thereof to be made, accurately designating the limits of the section to be drained, as far as possible the subdivision of the property therein contained, and the names of the proprietors and also the dimensions and directions of the canals intended to be dug; that such plan or plans should be deposited in the office of the Recorder of Mortgages of the parish in which the district to be drained was situate; that notices should be published once a week for four weeks in succession, announcing that such board would proceed to drain said section, describing the place where the plan thereof was deposited, accurately defining the limits thereof and indicating as nearly as possible the time within which the draining thereof would be completed, and the probable costs of said works. It was further provided that after such publications said Boards of Commissioners should

apply by petition to certain courts in said act specified, which courts, upon due proof being made of the publication of such notices, should decree that each portion of the property situated within the said limits was subject to a first mortgage lien and privilege in favor of said Board of Commissioners, for such amounts as might be assessed upon such property for its proportion of the costs of draining such districts, and interest thereon at six per centum from demand thereof; that the decrees of said courts should be recorded in the offices of the Recorders of Mortgages of the parishes of Orleans and Jefferson; that whenever said recorders or either of them should be required to deliver a certificate of mortgages on any real property embraced within said draining districts, such recorder should mention therein that such property was subject to a lien, privilege and first mortgage in favor of the Board of Commissioners of the district in which such property was situated, for such sum of money as might be assessed upon such property for the draining thereof, and that such lien, privilege and first mortgage should take precedence over all mortgages, liens and privileges whatsoever, whether tacit, conventional, legal or judicial, *and should attach to said property until the amount assessed and the interest thereon should be paid in full.*

Section eight of said act authorized and empowered the said Boards of Commissioners, each within its own district, to levy a uniform assessment upon the superficial or square feet of lands within said district to defray the expense of the construction of the levees, machinery, canals and other works necessary for the purpose of carrying out the provisions of said act, which assessments should be collected from time to time as the wants of said Commissioners should require, provided that the same should not in the aggregate exceed three hundred and fifty thousand dollars in any one district, and that not more than one-half should be demandable within two years after the passage of said act.

It was further provided (sec. 9), that on non-payment of the amount of an assessment, judgment therefor should

be recovered before any court of competent jurisdiction, and the land so assessed should be sold according to law; that each board might purchase and hold or dispose of the same for the benefit of such drainage district.

By section eleven an appropriation of eighty-one thousand dollars was made from the Swamp Land Fund to be divided among the said districts to aid in carrying out the objects of the act.

It does not appear that any progress was made in the work of draining under this act.

A year after its passage, and on the 17th day of March, 1859, an act was passed, declared to be "supplementary" to the Act of 1858 (Statutes, pp. 6, 7, 8), which provided (sec. 1): "That in order to enable the several Boards of Commissioners created under and by virtue of the Act" of 1858, "to carry into effect and commence immediately the work therein contemplated, each of said Boards of Commissioners be and are hereby authorized and empowered to issue bonds of the sum of five hundred dollars each, having not more than thirty years to run, and bearing interest not exceeding eight per cent. per annum." Said bonds to be designated as "draining bonds," and the total amount to be issued for any draining district not to exceed the sum of three hundred and fifty thousand dollars.

It was by said act (sec. 2) made the duty of said Commissioners upon issuing said bonds to fix and determine the amount of assessment to be levied upon the superficial or square feet within the draining districts, in conformity with the law of 1858, and fix and apportion the amount to be paid yearly by the owner or owners of said lands in order to pay the annual interest on said bonds and such bonds as might mature—the amount of assessment demandable and collectible yearly not to exceed, in the aggregate, more than one-tenth of such assessment.

It was also (sec. 3) made the duty of said boards to deposit daily any money which they should receive in payment of any assessments so levied, with the fiscal agent of the City of New Orleans to the credit of the draining fund of the proper district; and it was declared that the

amounts so deposited should be a special fund for the payment of the annual interest on said draining bonds and for the redemption of such bonds at maturity, and that money should only be drawn from said fund to pay said annual interest or redeem said bonds, or for the purpose of purchasing bonds, as in said act provided.

By section 4 it was provided that whenever, after paying the annual interest on said bonds and the principal of such as had matured, the amount remaining with said fiscal agents to the credit of the draining fund of either of said districts should exceed ten thousand dollars, the Commissioners for such districts should purchase therewith the bonds of said district outstanding having the shortest period to run.

And it was further provided (sec. 5), that after the completion of the works for the leveeing, draining and reclaiming of either of said draining districts, the Commissioners thereof should annually make an estimate of the amounts required to keep up and maintain the said works and continue the draining thereof, and furnish said estimate to the Common Council of the City of New Orleans, and to the Police Jury of the Parish of Jefferson, as said draining districts should lie within said city or parish, and that said Common Council and Police Jury should respectively levy a uniform tax or assessment upon the superficial or square feet of land situate within said draining districts respectively, sufficient to meet the amounts required, which taxes or assessments so levied should be collected in the same manner as the city and parish taxes, and paid to the respective Boards of Commissioners, who should disburse and account for the same.

On the first day of March, 1861, an act was passed, entitled "An Act to provide for the collection of the assessments for draining under the Act of March 18, 1858, and the act supplementary thereto of March 17, 1859" (Statutes, pp. 8 and 9).

In the single section comprising this act, it is provided that the amount of assessments which the Boards of Commissioners of the several draining districts are author-

ized to fix and apportion to be paid yearly by the owners of the lands within said districts, to pay the annual interest and the principal, as they may mature, of the bonds issued or to be issued by said Boards of Commissioners, by virtue of the said Supplementary Act of 1859, shall be collected and sued for by the following mode of proceeding:

"As soon as any assessment has been made, and notice thereof shall have been given, a copy thereof shall be filed in the Third District Court of New Orleans for the assessments made on property within the limits of the Parish of Orleans, and in the Third Judicial District Court, sitting at Carrollton, for assessments made on property within the limits of the Parish of Jefferson, on which tableau of assessments thus to be filed the property assessed shall be set forth, together with the amounts assessed and the names of the owners thereof, if known, and if the owners' names are not known then it shall be stated in said assessment roll that the property assessed belongs to owners unknown; that a petition shall be filed with said assessment roll praying for an order that all persons whom it may concern do show cause within thirty days from the first publication of said order, if any they have, why said assessment roll should not be approved and homologated; that said order thus rendered shall be published in the English and French languages at least twice each week for thirty days in one newspaper published in the City of New Orleans as to the order of the Third District Court of New Orleans, and in one newspaper published in the Parish of Jefferson as to the order of the Third Judicial Court, sitting at Carrollton; and after said publications the said Court shall, on motion of the counsel of said Board of Commissioners, approve and homologate said assessment rolls, which shall be a judgment against the property assessed *and the owners thereof*, on which execution may issue as on judgments rendered in the ordinary mode of proceedings, and the Court shall at the same time and in the same judgment, order the delinquent parties to pay ten per cent. in addition to the amount assessed, to pay costs and counsel fees."

Under these statutes Boards of Commissioners appear to have been appointed, proceedings were had to complete

the assessments, which will be more particularly recited hereafter, a plan of work was adopted, and some excavation was made.

In 1869 an act was passed (No. 51 of that year), entitled, "An Act to repeal the laws and parts of laws creating draining districts in certain portions of the parishes of Orleans and Jefferson, and providing the modes and means of draining the same, and to provide for the disposition of the property belonging to the said draining districts, and for collecting the taxes for draining purposes, and the manner the funds so derived are to be appropriated to aid in constructing the New Orleans and Ship Island Canal."

The preamble of this statute recites that the objects contemplated by the Act of 1858 cannot be effectually accomplished because of inherent defects in the law, among which are the want of accountability and unity of action on the part of the officers appointed to attain the objects contemplated; that large sums of money have been misapplied or squandered in ineffectual efforts to thoroughly drain the lands embraced in the draining districts mentioned; that the lands have not been protected from overflow; that property of great value had been destroyed and damaged, and the health of the city endangered, and that constructing the New Orleans and Ship Island Canal under the provisions of an act of incorporation, passed in 1868, would prevent the overflow of the City of New Orleans from the rear, and would furnish an ample channel into which the territory embraced in said districts could be completely drained.

This act provided for the consolidation of the three draining districts, and for the appointment of a single Commissioner by the Governor, to whom should be delivered all property held by the several boards, and all maps, plans, books pertaining to the business of said drainage districts, and all money, credits and assessments of taxes. The Commissioner was required "to settle and to adjust all accounts, to settle assessments and to collect them under the provisions of the Act of 1858 and the acts supplementary and amendatory thereof, and for the pur-

poses of said assessments and collections of taxes, the provisions of the acts now in force shall be and remain in full force until said assessments and collections shall be completed."

This statute contemplated the construction of a canal by the New Orleans and Ship Island Canal Company, and also a levee along the north line of said canal, and the payment to said company from the assessments already made, as the work progressed, in warrants to be paid from moneys collected upon said assessments as fast as the same were realized.

Nothing appears to have been done under this law, and the same was repealed by Act 30 of 1871 (Statutes, p. 13, sec. 10). It is not included in the printed statutes now presented to the Court, and is not related to the present controversy, except as it tends to show that the plans and agencies theretofore employed were unsatisfactory; that an effective scheme of drainage was deemed important, and was still insisted on by the State, and that such assessments as had been already made were recognized and regarded and treated as a source from which a large fund might be derived.

The next statute passed by the Legislature of Louisiana which is relevant to this controversy went into operation, without the signature of the Governor, in March, 1871, and is Act No. 30 of that year.

Up to the date of its passage, although there appears to be repeated and plain expressions of the legislative intent to have the City of New Orleans and its surroundings properly drained, and though there seems to have been no failure in an appreciation of the importance of this work, very little appears to have been effectively done in that direction. Besides the inadequacy of the instrumentality which had been adopted, of which there is plenty of evidence, the civil war period had intervened to interrupt the prosecution of the undertaking.

At any rate it appears that prior to 1871 there had been collected in money from the assessments made to do this work but $334,941.62 (Record, pp. 75, 610), and that on

the work actually done there had been expended less than $117,000 (pp. 75, 588).

Act No. 30 of 1871, above referred to, will be found from page 9 to 13 of the statutes, and is entitled "An act to provide for the drainage of New Orleans."

It is introduced by the following preamble:

"Whereas, the proper and efficient drainage of the City of New Orleans is of paramount importance to the sanitary and commercial interests of the city, as also of the State of Louisiana; and whereas, the Mississippi and Mexican Gulf Ship Canal Company are prepared to immediately undertake the work with the only kind of machinery adapted thereto and now ready for use, and to prosecute the same with energy and economy to completion, therefore, &c."

By this act the Mississippi and Mexican Gulf Ship Canal Company was authorized and empowered to excavate drainage canals and build protection levees under the conditions and with the stipulations in said act expressed (sec. 1).

The works to be constructed are described in a general way, but their exact locations were to be designated by the Board of Administrators of the City of New Orleans (page 10 of Statutes, sections 2, 3, 4 and 5).

It is made the duty of said board (section 6), immediately after the passage of the act, to locate the lines of the canals and protection levees specified in the act, and to build and run all pumps and drainage machines necessary to lift the drainage water from said canal or canals over into Lake Pontchartrain and to keep the water in the canals in process of excavation, as far as practicable at the proper level for the work of excavation, and at the same time assist the drainage of the adjacent lands.

Section 8 of said act provided that at the end of every month it should be the duty of the City Surveyor of New Orleans, or an engineer appointed by the Board of Administrators for that purpose, to examine the work done by said Mississippi and Mexican Gulf Ship Canal Company during said month, and, upon a

measurement, to certify as to the number of cubic yards excavated and the number of cubic yards of protection levees built during the said month. It was made the duty of the Administrator of Accounts on the presentation of said certificate by the president of said company, to draw a warrant or warrants on the Administrator of Finance in payment of the work so done, at the rate of fifty cents per cubic yard for excavation and fifty cents per cubic yard for the protection levee. These warrants the said Administrator of Finance was required to pay on presentation to him, in case there were any funds in the treasury to the credit of said Ship Canal Company; but should there not be sufficient funds to cash the said warrant or warrants, then the said Administrator of Finance was required to endorse upon the same the date of presentation, after which date the said warrant or warrants should bear interest at the rate of eight per cent. per annum until paid, which conditions should be set forth in the form of the said warrant or warrants.

In section 9 of said act it is provided that in order to provide funds for the payment of the work to be done by said company, the three Boards of Draining Commissioners established under the Acts of 1858 and 1859, and the amendments thereto, and all other persons and corporations who might have them in possession, should transfer to the Board of Administrators of New Orleans, "all moneys, assessments and claims of drainage in their hands or under their control, all titles to real estate, all books, plans, tableaux, judgments in favor of Commissioners," and everything pertaining to said draining districts. The Board of Administrators were declared to be "subrogated to all the rights, powers and facilities possessed and enjoyed by the Commissioners of the several draining districts or of any other corporation charged with the duty of drainage or leveeing within the limits of the City of New Orleans and Carrollton."

And the said section contained the following further provision:

"That the Board of Administrators be and are hereby

authorized and directed to collect from the holders of property within the said districts the balance due on the assessments, as shown by the books of the first, second and third drainage districts, under the acts of March 18, 1858, that of March 17, 1859, and the several supplementary and amendatory acts thereto, *which said assessments are hereby confirmed and made exigible, at such time and in such manner as the Board of Administrators may designate; provided, that the said board shall collect the assessments herein authorized in time to provide for the payment of the warrants to be issued to the said company at the date of their issue; also, to make assessments of two mills per superficial foot in those parts of the three draining districts, as existing under and created by, the acts of March* 18, 1858, *and of March* 17, 1859, *and amendments thereto, and on such other lands as are brought within the protection levees contemplated by this act, where no assessments have been made; and to execute and enforce the same as provided for by the several acts of the Legislature, creating and regulating said Boards of Draining Commissioners; provided,* that all money or moneys received by the said Board of Administrators from the said Commissioners of the drainage districts, either from the sale of property received from the said Commissioners, from the collection of claims for drainage now due, from the collection of drainage assessments, and from any of the sources of revenue contemplated by the provisions of this section of this act, *be placed to the credit of the Mississippi and Mexican Gulf Ship Canal Company, and held as a fund to be applied only to the drainage of New Orleans and Carrollton, in accordance with the provisions of this act; and that all property, not money, so received, shall be held in trust for the payment of said Mississippi and Mexican Gulf Ship Canal Company, and ultimately for the benefit of New Orleans, should the same not be required for the work of drainage.*"

Section 10 of this statute repealed all acts and parts of acts in conflict with or inconsistent with the provisions of said statute, and especially the law of 1869, hereinbefore referred to.

It was also provided (section 7) that the said Mississippi and Mexican Gulf Ship Canal Company should have, ready for work, within fifteen days after the passage of the act, machinery of sufficient power to excavate at least

twenty-five thousand cubic yards per month, and to move the same the distance required to build the protection levee, and should increase as soon as practicable such machinery to the capacity of at least fifty thousand cubic yards per month.

On the day this law was promulgated, to wit: March 14, 1871, notice was given in writing by the said Mississippi and Mexican Gulf Ship Canal Company to the City of New Orleans that it was prepared to immediately commence the work of drainage in accordance with the provisions of said act (Record, p. 338).

It appears that on the 16th day of March, 1871, the Mayor of the City of New Orleans directed W. H. Bell, the City Surveyor, to report the amount of money required to complete the drainage and protection levees under the Act of 1871.

On the 23d day of March, 1871, the City Surveyor submitted an "approximate estimate," in which he estimates the cost of canals and levees as $1,934,460, and expresses the opinion that the work and adequate machinery might be done and furnished for $3,000,000 (Record, pp. 339 and 340).

Up to this time assessments had been made only in the first and second draining districts. These amounted in the aggregate to $1,296,802.15. There had been credited upon these assessments by the Commissioners of those districts prior to the assumption by the city of the work under the Law of 1871, the sum of $506,180.73, leaving applicable to a continuation of the work from those assessments $790,621.42 (Record, p. 610). The area of the remaining territory to be assessed was known, and the rate of assessment per foot was fixed by section 9 of the Laws of 1871 at two mills. It was, therefore, easily ascertainable that the assessments thereon would aggregate $909,015.74 (as they did when made) (p. 810), and that if the city relied alone on the proceeds of all such assessments she would have but $1,699,637.16 to pay for canals and levees costing $1,934,460, and to complete work and machinery estimated to cost, with such canals and levees, $3,000,000.

Therefore we very naturally find an ordinance proposed in the Common Council of the City of New Orleans on the 4th day of April, 1871, providing that the city would issue warrants for the payment of the work, as required by the act of the Legislature, which warrants should have inscribed thereon or endorsed thereon that they should not be enforceable by suit or judgment, but that if they were not paid within one year out of the proceeds of the drainage tax and assets, they should be fundable in bonds of the city bearing eight per cent. interest, payable semi-annually, having ten years to run, and with due provision for retiring the same and securing the punctual payments of interest and gradual extinction of the principal, *and that the city and company should agree to apply to the Legislature for approval of the issue of the said bonds* (Record, p. 338).

It does not appear that this identical ordinance was adopted, but a few days thereafter an ordinance was adopted by the Common Council, and was passed, notwithstanding the veto of the Mayor, on the 21st day of April, 1871, numbered 814, Administration Series, and which will be found on pages 340, 341 and 342 of the Record.

In the preamble of this ordinance there is found something in the nature of a protest against certain portions of the Act of 1871, so far as it puts in question the right of the city to control its drainage system and contract for the work; but this is followed by the following declaration:

"Yet convinced of the importance of an effective drainage system, of the desire of the public for its accomplishment without further delay, and satisfied of the capacity and readiness of the said company to perform the work required by the city, it is deemed proper by the Council aforesaid to ordain as follows:"

By this ordinance it is provided that all matters appertaining to drainage and the protection of the city from inundation be placed under the immediate charge of the Administrator of Improvements aided by the City Sur-

veyor; that the Mayor and Administrator of Finance be appointed with the Commissioner of Improvements as a Standing Committee on Drainage, to act until the further pleasure of the Council; that it should be the duty of said committee to prepare a plan of work *to be entered upon immediately*, and to report to the Council what canals and levees or extension of present canals and levees were most urgently required, and that upon approval of the same by the Council, the Administrator of Improvements should *authorize the Mississippi and Mexican Gulf Canal Company to enter upon the performance of said work* under his direction.

By section 3 of this ordinance, the city, after expressly notifying the company that it does not waive its right freely to contract for the work with the company or any other party, and that directing or allowing the said company to enter upon and perform any portion thereof is not to be considered as supplying them exclusive rights to its performance or completion, or continuing the same further, or otherwise than during the pleasure of the Council, declares "that the said company is further notified that such work, and no other, as shall be performed with the consent and approval of the Council, will be settled for as hereinafter provided."

Then follow further provisions of section 3, that the Surveyor should measure and certify the dimensions of all the canals and levees then existing, so far as the same might form part of the canals and levees to be constructed—the same to be allowed for by the company in deduction of their measurements of work performed and completed; that the canal work should be measured and certified monthly, and that the levee work should be measured and certified monthly, so far as the same should have been shaped and completed and sufficiently dried for the passage thereon of vehicles; that the earth removed from the canals and not required for levees should be the property of the city and disposed of as the city may deem proper, and that the payments, certifications and warrants issued to the

said company should be based upon and computed according to the measurements made as aforesaid.

The protests and the notifications contained in this ordinance are innocent and harmless enough, as against the positive requirements of the statute of the State—especially in view of the fact that the work was undertaken and continued by the contractor and substantially in the manner commanded by the statute.

In one important point, however, the Common Council, better informed than the Legislature as to the financial features of the drainage problem, went beyond the Statute of 1871. This ordinance introduces for the first time the plan of issuing bonds of the city to supplement drainage assessments, and for the purpose of paying the expense of the scheme of drainage.

The language of the ordinance on this subject is as follows:

"The city shall issue warrants for the payment of the work as required by the act of the Legislature, and in case of the non-realization or non-collection of assets provided for therein, the same to bear eight per cent. per annum interest, the said warrants to be issued with the understanding to be inscribed therein or indorsed thereon that they shall not be enforceable by suits and judgments; but if not paid within one year out of the proceeds of the draining tax and assets, they shall be fundable in bonds of the city bearing eight per cent. interest, payable semi-annually, having ten years to run, and with due provision for retiring the same and securing the punctual payment of interest and gradual extinction of the principal.

The city shall have power to sell said bonds or give the same in payment of the work performed; but no sale or exchange shall be made at a price less than eighty cents on the dollar exclusive of interest, and any holder of any fundable warrant, after thirty days' notice, if not paid in money, may demand bonds for the same at eighty cents on the dollar" (Record, p. 342).

Soon after the passage of this ordinance certain work was ordered and laid out by the city authorities, and the

Mississippi and Mexican Gulf Ship Canal Company was directed to commence the same—subject to the terms and conditions of said ordinance (Record, pp. 343, 344, 345 and 346).

The first work done by the company under the statute and ordinance mentioned was about the first of July, 1871, and it was continued until May, 1876 (Record, pp. 67, 619), always under the direction of the Administrator of Improvements and the City Surveyor, the officers put in charge of the work by ordinance 814, sec. 1 (Record, p. 341), testimony of Van Norden and Noyes (pp. 343, 370).

Proof of the acceptance by the company of the terms of ordinance 814 is furnished by its proceeding to do work under the same, by its acceptance of warrants for the same in the form provided for by said ordinance (Van Norden's testimony, Record, pp. 367 to 373), and by the positive testimony of the president of the company (Noyes' testimony, Record, p. 343).

While the work was going on and warrants therefor which provided for their exchange for bonds were being made and delivered, no bonds were actually issued, and there was as yet no special authority by statute for the issuing of the same.

But on the 26th day of April, 1872, a statute of the State of Louisiana was approved, the 13th section of which reads as follows (Statutes, p. 14):

SEC. 13. *Be it further enacted, etc.*, That for unbonded *debts* existing December 31, 1871, and unpaid at the time of the passage of this act, or *caused* by receipts of certificates of 1871, for revenue proper of 1872, and for excavations and levees, drainage machinery and revetments authorized by law or required for the protection of the city from overflow or inundation, the city may issue from time, as they may be required, bonds of the denomination of five hundred and one thousand dollars, having fifty years to run, and bearing seven per cent. interest, principal and interest payable in gold in New York or New Orleans, and at any other point that the Council may designate, with quarterly coupons, and that the bonds thus issued shall be called the new consolidated debt of New Orleans. No bonds shall be issued but by authority of the Council, nor

for a lower rate than ninety cents on the dollar; all issued for the excavations and levees, authorized by Act No. 30 of 1871, or by drainage laws previously enacted, shall be marked "Drainage Series," and all taxes collected for drainage, and not required for the payment of drainage warrants, shall be devoted to the purchase from the lowest bidder of bonds issued for drainage; no bid to be accepted above par, and the right reserved to the Council to reject all unsatisfactory bids.

It is claimed on the part of the appellants that this statutory provision supplemented and became a part of Act 30 of the Laws of 1871, and that it sanctioned ordinance 814, and that, thereupon, these, with the other proceedings had and the acts of the parties, constituted a valid contract on the part of the city that it would pay the cost of excavation and the construction of canals and levees in cash from the proceeds of drainage assessments or by the issue of its bonds.

The city, pursuant to the said contract, began the issuance of its bonds for such work on the 10th day of May, 1872, after the passage of the law especially authorizing them, and continued to issue the same until the 31st day of December, 1874. The bonds issued between those dates aggregated in amount the sum of $1,672,105.21, and the warrants for which these bonds were exchanged amounted to $1,501,494.39 (Record, p. 423 to 429). After December 31, 1874, the further issue of bonds was refused, for the reason that at the general election held in November, 1874, an amendment to the Constitution of the State of Louisiana was adopted in the following terms (Statutes, pp. 22 and 23):

Article —. The City of New Orleans shall not hereafter increase her debt in any manner or form, or under any pretext. After the first day of January, 1875, no evidence of indebtedness or warrant for payment of money shall be issued by any officer of said city, except against cash actually in the treasury; but this shall not be so construed as to prevent a renewal of matured bonds at par, or the issue of new bonds in exchange for other bonds, provided the city debt be not thereby increased, nor to prevent the

issue of drainage warrants to the transferee of contract, under Act No. 30 of 1871, payable only from drainage taxes and not otherwise; any person violating the prohibitions [provisions] of this article shall, on conviction, be punished by imprisonment for not less than two nor more than ten years, and by fine of not less than three dollars nor more than ten thousand dollars.

The warrants now outstanding amount, without interest, to $681,108.62, and it appears from a statement of such warrants put in evidence, that the first of said outstanding warrants was issued January 11, 1875, and the last June 6, 1876 (Record, p. 93 and pp. 535 to 542). A stipulation annexed to said statement (page 543), declares that warrants amounting to $300,000 and others amounting to $16,000 in addition, were issued under a certain act of transfer of drainage rights, property and machinery made by the transferee of the Mississippi and Mexican Gulf Ship Canal Company to the City of New Orleans June 6, 1876. The remainder of said warrants amounting, according to this statement, to $365,108.62, were issued for excavations and drainage work.

The sale or transfer above referred to, was made to the City of New Orleans under Act No. 16 of the Laws of 1876, passed February 24, in that year (Statutes, pp. 15 and 16).

This statute authorized the Common Council of the city to contract with the Canal Company and its transferee, for the purchase and settlement of all its rights, franchises and privileges created, authorized or arising in favor of said company or its transferee, by virtue of Act 30 of 1871, and also for the purchase by the city of all tools, implements, machines, boats and apparatus belonging to said company or its transferee, and by it or him used for or pertaining to drainage work authorized to be done by said Act 30.

Said act further provided that in case it should be deemed advisable by said Common Council to make said purchase, appraisers should be appointed to estimate the value of the things to be purchased; that the amount to

be paid when agreed upon should be paid in drainage warrants by the City of New Orleans, which warrants should be issued in the same form and manner as those theretofore issued to the transferee of said company under Act 30 of 1871, and that they should be made payable out of the drainage assessments, and should be issued as soon as an agreement of purchase should be completed.

Section 4 of said act reads as follows:

SEC. 4. *Be it further enacted, etc., etc.*, That whenever the sale and purchase contemplated by this act shall be completed and the drainage warrants issued in payment of the price agreed on and fixed, the City of New Orleans, through its officers, shall have exclusive control of all the rights, powers and franchises granted by Act No. 30 of Acts of 1871 relative to drainage or other public works to the Mississippi and Mexican Gulf Ship Canal Company or its transferee; the City of New Orleans shall alone have the power, either through its own officers and employees or by contract to the lowest bidder, to do all canalling, dredging, ditching, or drainage work required to be paid for by assessment upon property or from the City Treasury.

Under this statute the City Surveyor was, on April 26, 1876, directed to make an examination of the property and report (Record, p. 241).

On the first day of May, 1876, he made his report, estimating the value of the property at $153,750, and reporting also upon certain damages claimed against the city, the amount of which he failed to specify (Record, pp. 241 to 247).

On the 26th day of May, 1876, an ordinance was passed (No. 3539) authorizing and instructing the Mayor to enter into an agreement for the purchase of said property and the settlement of all damages, and authorizing the Administrator of Accounts, upon the execution of said agreement, to draw upon the Administrator of Finance for the sum of $300,000 in drainage warrants in full payment and settlement (Record, pp. 247, 248).

On the 7th day of June, 1876, this agreement of purchase and transfer was entered into (Record, pp. 248 to

254); the said property was taken into the possession of the city, and warrants were issued in payment and settlement, dated June 6, 1876, apparently for $316,000, as appears by the statement and stipulation on page 543, though the sum of $320,000 was agreed on between the parties (Record, pp. 251, 253).

Thus far, in this presentation of facts the attempt has been made to exhibit to the Court the origin and purpose of the warrants issued by the City of New Orleans, and of the bonds issued by said city in exchange for a part of said warrant. To the holders of the balance of said warrants still outstanding, it is claimed the city should account.

Inasmuch as an important contention on the part of the appellants is based upon the theory that the city is now indebted to the drainage fund for assessments made upon its property, it is proper to refer briefly to the conditions and proceedings out of which this indebtedness arose:

Under the law of 1858, Commissioners were duly appointed in the first and second draining districts thereby created.

On the 24th day of August, 1861, in strict conformity with that act and upon the petition of the Commissioners for the first district, a judgment was entered decreeing that each portion of the property situate within the limits of said district, be subjected to a first mortgage lien and privilege in favor of said Commissioners, for such amount as might be assessed upon it for its proportion of the whole cost of draining said section, with interest thereon at six per cent. per annum from demand until final payment (Record, pp. 115, 116).

Like proceedings were had as to the lands in the second draining district, lying within the Parish of Orleans, and a like judgment as to such lands was entered on the 9th day of February, 1861 (Record, pp. 156, 157).

A similar judgment was entered as to the lands in said

second district, lying within the Parish of Jefferson, on the 29th day of April, 1861 (Record, pp. 143, 145, 146).

No proceedings were had touching the third and fourth districts until after the passage of Act 30 of the Laws of 1871, by which the Board of Administrators of the City of New Orleans were "subrogated to all the rights, powers and facilities possessed and enjoyed by the Commissioners of the second draining district."

On the 4th day of May, 1872, *upon the petition of the City of New Orleans as such subrogee*, a judgment was entered decreeing the lands in the third draining district, subject to a first mortgage lien and privilege, in the same language as that used in the judgments concerning the land in the first and second districts (Record, pp. 168, 169).

On the 7th day of February, 1872, the Common Council of the City of New Orleans, by ordinance No. 1359, created the fourth drainage district, and fixed the boundaries thereof (Record, pp. 111, 112).

On the 29th day of January, 1873, upon the petition of the City of New Orleans, and the Board of Administrators of said city, a judgment was entered, in the same form as those affecting the lands in the other districts, by virtue of which the lands in said fourth district were subjected to a like first mortgage lien and privilege (Record, pp. 180, 181, 182).

On the 12th day of September, 1861, the Board of Commissioners for the first draining district levied an assessment of three and three-tenths mills upon each square foot of the lands situate within said district (Record, page 113).

On the 11th day of March, 1861, the Board of Commissioners for the second draining district levied an assessment of two mills upon each square foot of the lands situate in that district (page 113).

On the 11th day of June, 1872 *the City of New Orleans* by ordinance No. 1569, levied an assessment of two mills upon each superficial foot of the lands situate in the third draining district (Record, p. 114).

And on the 20th day of November, 1872, the said city by ordinance No. 1877, levied an assessment of two mills upon each superficial foot of the lands situate in the fourth drainage district (p. 114).

Tableaus of these assessments were prepared pursuant to Act No. 57 of 1861 (Statutes, pp. 8 and 9), and in the form therein prescribed, and petitions were presented to the proper court, praying for the approval and homologation of such assessments.

On the fifth day of February, 1863, the petition of the Commissioners for the first district was filed, praying for approval and homologation of the assessment made in that district, and with such petition there seems to have been presented the tableau of such assessment (Record, p. 117).

On the 11th day of March, 1863, the said assessment roll or tableau was approved and homologated "as far as not opposed," and declared to "operate as a judgment against the property assessed *or the owner or owners thereof*" (Record, p. 118). In the extract from the assessment roll filed in this proceeding the City of New Orleans appears to be assessed for $20,584 40 (Record, pp. 192 to 197).

Probably owing to the terms of the resolution by which the assessment in this district was made, providing that only one-tenth thereof should be collected within the ensuing twelve months, another petition was filed December 7, 1871, on behalf "of the City of New Orleans and the administrators thereof," reciting that "a tableau or assessment roll of the amount to be paid for draining the property within the first draining district within the Parish of Orleans from the second to the tenth annual installment inclusive," had been prepared, a copy of which was presented with said petition, to be filed in the Court, and praying for the approval and homologation of the same (Record, pp. 119, 120). Objection was made by various parties to such approval and homologation. The objections covered every conceivable ground except payment.

See a statement of such opposition (Record, pp. 414 to 420).

Judgment was entered in this proceeding refusing such homologation and vacating the tableau (p. 120).

*The City of New Orleans* appealed from this judgment, and on the 21st day of March, 1874, said judgment was reversed and the tableau and assessment was approved and homologated, and it was adjudged that such approval and homologation should "operate as a judgment against the property described as assessed in said roll, and also against the owner or owners thereof" (Record, pp. 155, 122. See also 27 Ann. Rep., p. 20).

An extract from the assessment roll, filed with the petition, and thus approved and homologated, will be found at pages 139 to 143 of the Record, from which it appears that the City of New Orleans is assessed for street and other public property in the sum of $223,111.60. See extract from assessment roll filed by order of Court in place of the above, in which assessment against the city amounts to $231,168.50 (Record, p. 199).

On the 15th day of March, 1869, upon the petition of the Board of Commissioners of the second draining district, judgment was entered approving and homologating the assessment roll for drainage taxes upon lands situate in said second district, and lying within the Parish of Jefferson, and it was therein declared that said decree should operate as a judgment against the property assessed and the owner or owners thereof (Record, pp. 146 to 148).

Upon the assessment roll presented with said petition the Parish of Jefferson and the cities of Jefferson and Carrollton were assessed as owners of property in said district in the sum of $123,749.99 (Record, pp. 149, 150).

On the 11th day of November, 1868, upon the petition of said Board of Commissioners, a like judgment was rendered approving and homologating the assessment roll in said second district, so far as its affected lands in said district lying within the Parish of Orleans (Record, pp. 158, 159).

Upon the assessment roll filed with this petition the

City of New Orleans was assessed as the owner of property in the sum of $71,431.81 (Record, pp. 161 to 163).

On the 8th day of November, 1872, *upon the petition of the City of New Orleans, as subrogee,* a like judgment was duly rendered affirming and homologating the assessment roll in the third draining district (Record, pp. 170, 172).

Upon the assessment roll filed with this petition the City of New Orleans was assessed as the owner of property in said third district in the sum of $205,026.79 (Record, pp. 173 to 175).

On the 15th day of March, 1873, *upon the petition of the City of New Orleans,* and the Board of Administrators of said city, a like judgment was duly rendered, approving and homologating the assessment roll in the fourth draining district (Record, pp. 188, 189); and it appears that on said assessment roll the City of New Orleans was assessed as the owner of property in said fourth district in the sum of $65,956.72 (Record, p. 189).

The aggregate of these assessments thus reduced to judgments against the City of New Orleans is $717,918.21.

On a statement to be found at page 610 of the Record the amount of these assessments is put down at $697,936.28.

By Act No. 7, Statutes of 1870, passed March 16th of that year, the limits of the City of New Orleans were extended so as to embrace the City of Jefferson, and it was in said act declared that all indebtedness of said City of Jefferson was to be assumed and paid by the City of New Orleans (Statutes, p. 20).

The limits of said City of New Orleans were again extended by Act No. 71 of the Statutes of 1874, passed March 23d in that year, and it was therein declared that all the indebtedness of the City of Carrollton should be assumed and paid by the City of New Orleans (Statutes, pp. 21, 22).

The assessments so originally made against the City of New Orleans for drainage taxes, and the assessments against the outlying territory, the payment of which was devolved upon said city by the statutes just referred to, all of

which have passed into judgments, constitute an indebtedness against the city to the drainage fund which should be paid for the benefit of the holders of drainage warrants; and the City of New Orleans now contends that these assessments and judgments, if at any time valid claims against said city, have been paid by the issuance of the bonds, a history of which we have herein presented, and which were exchanged for warrants, other than those involved in this controversy, and which were given for drainage work.

## POINTS.

### I.

**The Assessments against the City of New Orleans, made to meet the expense of Drainage, constituted a debt against the City which she, like every other assessee, owed to the Drainage Fund.**

The Statute of 1858 required the Commissioners to make a plan of their respective districts, designating the limits thereof, "*the subdivision of the property therein contained and the names of the proprietors*" (Sec. 7, Statutes, p. 4).

The Court was required by this same section to decree "that *such portion of the property situated within the said limits* is subject to a first mortgage lien," &c.

By section 8 of the same statute each board was authorized and empowered to levy a "uniform assessment or assessments upon the superficial or square feet of lands situate within the draining section or district of such board" (Statutes, p. 4).

Similar language is also contained in section 2 of the Law of 1859 (Statutes, p. 6), which provides for an assessment to pay bonds which might be issued by the Drainage Commissioners, and in section 5 of the same act (Statutes, p. 7), providing the manner in which money should be

raised to maintain the drainage works after their completion.

In the Law of 1861 (Statutes, p. 8), where provision is made for judgments to be entered against lands assessed and the owners thereof, "assessments made upon property within the limits" of certain territory is spoken of and the "names of the owners thereof" is required to be given.

There is not a hint anywhere in these statutes that public property is to be exempted from assessment. All the property within the limits of the drainage district is to bear the burden of the assessments. And evidence is furnished that public property and streets and highways were to be included, by the language contained in section 8 of the Act of 1859 (Statutes, pp. 7 and 8).

It is therein provided that the Boards of Commissioners shall at all times have access to any plans or parts of plans of the City of New Orleans and Parish of Jefferson, "the same to include the street or streets, roads or highways of any portion or section thereof to be drained, according to the provisions of this act and the acts to which this act is amendatory."

When we consider that these boards of commissioners were to make the assessments, the inference naturally arises that these plans *including streets and roads* were to be used to aid them in that duty.

An assessment upon streets and public property under a similar provision of a law passed in 1835 has been upheld by the Supreme Court of Louisiana, and perfectly satisfactory reasons given therefor (11 *Ann. Rep., p.* 377).

And the same principle is sanctioned in the following cases:

*Marquez* v. *New Orleans*, 13 *Ann.*, 319.
*Succession of L. Foucher*, 26 *Ann.*, 363.
*Barber Asphalt Paving Co.* v. *Cosgrove*, 41 *Ann.*, 251.

Lacy vs. The City of New Orleans. 28 Ann. 184

Besides, Act 30 of the Law of 1871 expressly "confirmed and made *exigible*"—*i. e.*, "that may be exacted" (Worcester); "capable of being exacted; demandable; requir-

able" (Webster)—the "assessments as shown by the books of the first, second and third drainage districts, under the Acts of March 18, 1858, that of March 17, 1859, and the several supplementary and amendatory acts thereto" (Statutes, page 12).

And finally the Court below in this case seems to unwillingly admit, that this question is disposed of favorably to the appellants, upon the authority of the case in 11 Ann. and by this statutory confirmation (Opinion, Record, pp. 783, 784).

But these assessments against the city were not only valid liabilities, but they became by the homologation of the assessment rolls, *judgments against the property assessed and the municipality*, by the express words of Act 57 of the Laws of 1861 (Statute, p. 9).

The language of this law is that the courts therein named "shall on motion of said Board of Commissioners approve and homologate said assessment rolls, which shall be a judgment against the property assessed *and the owners thereof* on which execution may issue as on judgments rendered in the ordinary mode of proceedings" (Statutes, p. 9).

It does not seem possible that any fundamental or constitutional objections can be made to the proceedings prescribed for the obtaining of this judgment.

The proceeding was in a court having jurisdiction, the parties against whom the claim was made were duly cited, opportunity for defense was abundantly given, and a solemn decree of the Court was regularly entered, in all respects according to law.

It has been decided in this Court, in a case involving these very proceedings, that these judgments cannot be successfully assailed as depriving persons of their property without due process of law (*Davidson* v. *Board of Administrators, &c.*, 96 *U. S., p.* 97). This case affirmed the decree of the Supreme Court of Louisiana, in which it was held that a judgment on such assessments against the lands, and also against the owners thereof, was legal and valid.

27 Ann., p. 20.

It seems that in the proceedings to homologate the assessments in the first draining district the City of New Orleans appeared and appealed from the judgment of homologation, but that she afterwards abandoned her appeal (Record, pp. 374, 375, 385).

No other opposition was ever made by the city to the entry of these judgments against her. On the contrary, judgment upon all except the first installments of the assessments in the first district and upon the entire assessments in the second district—that is upon nine installments in the first, and upon all assessments in the third and fourth districts—were rendered *upon the application of the city itself* (Record, pp. 119, 170, 183).

It was thought best for safety to have the judgments upon these assessments revived; and proceedings for that purpose were instituted and carried to completion by the city (Record, 152 to 155, 178).

These assessments against the city no longer rest upon the question of their validity or propriety *as assessments*. By "due process of law," and through proceedings in full accordance with every legal and constitutional requirement, they have passed into judgments, conclusive against the city as to all questions involving the validity and regularity of the assessments, and like any other judgments, conclusive in this Court as to the liability of the defendant.

*United States ex rel. Ranger* v. *The City of New Orleans*, 98, *U. S.*, 381.

In the fourth draining district the assessments and judgments against the City of New Orleans, which have been annulled by the State courts, amounted to $65,956.72 (Record, p. 189).

This district was not created by the Law of 1858, as were the other districts, but was laid out, bounded and assessed by an ordinance of the city, numbered 1,359, adopted February 7, 1872 (Record, p. 111).

This action of the city was based upon Act No. 30 of the Laws of 1871, which enacted in section 9 (Statutes, p. 12),

that to provide funds for the payment of the work, the Board of Administrators of the city should make assessments "in those parts of the three draining districts as existing under and created by the Acts of March 18, 1858, and of March 17, 1859, and amendments thereto, *and on such other lands as are brought within the protection levees contemplated by* this act, where no assessments have been made, and to execute and enforce the same as provided for by the several acts of the Legislature creating and regulating said Boards of Draining Commissioners."

The object of the ordinance creating the fourth district was to embrace within a new district, and subject the same to assessment, certain lands "brought within the protection levees contemplated by this act" (Act of 1871) which was not included in any district theretofore created. And it will be seen that in the same ordinance which creates and defines this new district a protection levee is laid out.

On the 14th day of May, 1873, the city distinctly recognized the existence of this new district by passing an ordinance (No. 2128) referring to the Ordinance making an assessment therein, passed in November, 1872, and providing that such assessments be construed as payable in ten annual installments (Record, p. 599).

In the petition *filed by the city*, asking that a first mortgage lien be declared upon the lands within said district, the proceedings by which this district was created are set out, and the Court granted the decree (Record, 180 to 182).

Again, in the proceedings to homologate the assessments therein, the Court by its decree necessarily adjudged that said district was legally organized (Record, pp. 183 to 186).

It seems, too, that a copy of this judgment specifying the amount of assessments decreed against the city, was expressly served on said city (Record, p. 187).

Moreover, in an action by the State on the Relation of Warner Van Norden, the transferee of the Mississippi and Mexican Gulf Ship Canal Company, *against* The Mayor

and Administrators of the City of New Orleans, asking for a writ of mandamus compelling them to proceed with the collection of the assessments in all of said districts, including the fourth, a writ was allowed, and on appeal this determination was affirmed (Record, pp. 323 to 327; 27 Ann. Rep., p. 496).

These proceedings were had in 1875, at or before the time when the drainage work was progressing and the warrants now outstanding for such work were being issued. Those who did the work and to whom these warrants were issued are entitled to the benefit of the adjudications of the Court, as they then stood, upon all questions affecting their right to payment for work performed.

*Douglass* v. *Pike County*, 101 *U. S.*, 677.

*In Anderson* v. *Township of Santa Anna*, 116 *U. S.*, 356, the rule on this subject is thus stated:

"While the courts of the United States accept and apply the construction of a State Constitution or of a local statute upon which the rights of parties depend, which has been fixed by the course of decision in the State courts, it is the settled doctrine of this Court that rights accruing under one construction, will not be lost merely by a change of opinion in the State courts."

From a statement to be found in the Record, at page 629, it appears that all the work done in the fourth district was done in April and May, 1876.

This work was therefore performed and the contractor's right accrued under a contract with the city, *at a time* when the adjudications of the State courts sanctioned and upheld the validity of the creation of the fourth draining district in the proceedings which have been referred to, and in which that question was necessarily involved.

## II.

**The assessments against the City of New Orleans and the judgments entered thereon were not paid and satisfied by the issue and delivery of the bonds of the city issued under the provisions of Act 73 of the Laws of 1872, and City Ordinance number 814.**

The Circuit Court held to the contrary of this proposition and decided that the bonds which the city had issued in exchange for drainage warrantshad not only paid such warrants but also the assessments against her; and that after such payment she was still an actual creditor of the drainage fund (pp. 784 to 787).

The Court presents three views or theories, all destructive of the claim of the appellants on this branch of the case; these are:

1st. That in some way the issue of these bonds operated to pay the city's drainage assessments.

2d. That the city being a trustee, had *by error* issued bonds which should have been made payable from the drainage fund, in such form as to constitute a debt against the city, and that on account thereof she should be credited "to the extent of which she had relieved the fund."

3d. That even if the bonds issued were, and were intended to be, the general bonds of the city, she being a trustee, and such bonds absolutely her own, they were nevertheless intended to be charged against the drainage fund, and that the city became a creditor to the fund to that extent (Record, p. 787).

The attempt has been made by the plan of separate statements touching the said bonds and assessments herein adopted, to suggest to the Court how distinct and independent of each other such bonds and assessments were in their creation, and still are. As bearing upon the

purpose of these bonds, and the emergency in which they had their birth, and as showing that they had not the least relation to the payment of the city's assessments, a brief recapitulation may not be amiss.

By the Law of 1858 the plan adopted for the payment of the cost of drainage was the levying of an assessment, the creation of a mortgage lien for the same, continuing until the tax was paid, a judgment to be recovered for said tax in the ordinary method in case of non payment, and a sale of the land to satisfy the same (sections 7 and 8, Statutes, pp. 4, 5).

Within one year the deficiencies of this plan were apparent, and the Law of 1859 was passed permitting the several Boards of Commissioners to issue bonds for the work, payable, however, only out of funds collected from such assessments, and requiring said boards to apportion the amount of such assessments to be paid yearly to meet the interest and principal of said bonds (Statutes, pp. 6, 7).

And still the scheme lacked efficiency; so that in 1861 another law was passed, providing that the approval and homologation of an assessment roll by the courts should be "a judgment against the property assessed *and the owners thereof*, on which execution might issue as on judgments rendered in the ordinary mode of proceeding" (Statutes, p. 9).

By the preamble to a law passed in 1869, it was declared that the objects contemplated by the Law of 1858 could not be effectually accomplished because of inherent defects in the law, among which were stated to be want of accountability and unity of action on the part of officers. It is further declared that large sums of money had been misapplied or squandered; that the lands had not been protected from overflow, and that property of great value had been destroyed and damaged, and that the health of the citizens had been endangered. This statute provided for the construction of the New Orleans and Ship Island Canal, to be paid for from the assessments made under the Law of 1858 as they were collected. (See the reference to this law by the Master in his Report—Record, pp. 53 to 56.) Not-

withstanding the preambulary pretensions of this statute, nothing seems to have been done under its provisions during its brief existence. It was repealed in 1871 (Statutes, p. 13, section 10).

Act 30 of the Laws of 1871 was next passed, and under this statute the first real start appears to have been made in drainage work. It provided that the Mississippi and Mexican Gulf Ship Canal Company should excavate drainage canals and build protection levees. It gave general supervision of the work to the city authorities; it fixed the prices to be paid therefor, it confirmed the assessments made under previous laws, and provided that warrants should be given for the work, and that moneys received from assessments should be placed to the credit of the contractors, and held as a fund to be applied only to drainage; that if there were not sufficient funds to cash said warrants on presentation, they should draw interest from that time at the rate of eight per cent. until paid (section 8, Statutes, p. 11). Assessments were also directed to be made upon lands within protection levees upon which no assessments had been made (p. 12).

By this act, though payments for drainage work were still left to depend upon the collection of drainage assessments, a decided advance was made by fixing the prices to be paid for the work, by allowing interest on warrants remaining unpaid, and by directing other assessments to be levied at a stated rate.

But the City of New Orleans appreciated the fact better than the Legislature that something more was necessary to insure the performance of the work. The officers of the city were on the ground and knew the delay and uncertainty attending the collection of drainage assessments. And so, while complaining of the interference of the State, the city, declaring itself "convinced of the importance of an effective drainage system, of the desire of the public for its accomplishment without further delay, and satisfied of the capacity and readiness of the said company to perform the work required by the city," ordained that in case the warrants issued for drainage work to be done by the

Mississippi and Mexican Gulf Ship Canal Company should not be paid within one year out of the proceeds of the draining tax and assessments, they should "be fundable in bonds of the city, bearing eight per cent. interest, payable semi-annually, having ten years to run, and *with due provision for retiring the same* and securing the punctual payment of interest and *gradual extinction of the principal.*" (Ordinance 814, passed April 21, 1871; Record, p. 340, 341, 342.)

This is the first appearance on the scene of a general bond of the city to be issued for the payment of drainage work. It was clearly intended as a new and independent means of such payment, not at all dependent upon drainage assessments or their collection. Warrants for work were to be paid in cash upon presentation if money sufficient for that purpose collected from drainage assess ments was on hand. If not, bonds were to be issued, and by that means the work was to be paid for, without affecting the assessments still uncollected.

It was supposed that an act of the Legislature was necessary to legalize the issue of these bonds. At any rate, by Act No. 73 of the Laws of 1872 such authority was given. It was therein provided that "for excavations and levees, drainage machinery and revetments authorized by law, *or required for the protection of the city from overflow or inundation*, the city may issue, *from time to time, as they may be required*, bonds of the denomination of five hundred and one thousand dollars, having fifty years to run and bearing seven per cent. interest, principal and interest payable in gold, *in New York or New Orleans, and at other points that the Council may designate.*" It was further provided that all bonds "issued for the *excavations and levees authorized by Act No. 30 of 1871, or by drainage laws previously enacted,* shall be marked 'Drainage Series,' and that all taxes collected for drainage and not required for the payment of drainage warrants should be devoted to the purchase from the lowest bidder of bonds issued for drainage" (Statutes, page 14).

Here is authority, as broad as could be desired, for the

issuance by the city of its bonds as a means for paying for drainage work to be done in the future, as well as such as may have been already done. The bonds were to be issued "from time to time, as they may be required." This statute also plainly contemplates that the assessments should constitute another and an additional source of payment for drainage work. The bonds for drainage were to be marked "Drainage Series," so that they might be identified. Drainage warrants were still to be paid from drainage funds if they were on hand, and only such moneys collected from assessments were to be applied to the purchase of bonds as were not required to pay outstanding warrants.

If the criticism be made that the bonds thus authorized by the Legislature were different in form from those which in the prior city ordinance were described, the answer is that though work was commenced in July, 1871 (Record, p. 619), no bonds were issued by the city until May, 1872, and after the passage of the act authorizing them (Record, p. 423); and when they were issued they were in strict accordance with the terms of the Law of 1872 (Van Norden's testimony, Record, p. 370). Thus the city accepted the conditions of the statute as to the form of the bonds and proceeded under it.

The amount of these bonds issued from May, 1872, to January 1, 1875, was $1,672,105.21.

1st. *These bonds were authorized for the purpose of paying for work done and not in discharge of the city's assessment.*

(*a.*) It is provided in Act 30 of the Laws of 1871, and in ordinance No. 814, which directed the work to be done, that engineers' certificates should be made monthly, exhibiting the amount of work completed, and that the warrants issued should be based upon such certificates. (Statutes, p. 11, Record, p. 342.)

(*b.*) The certificates thus provided for were actually made out as the work progressed. A list of these certificates will be found at pages 585 and 586 of the Record.

(*c.*) The Act of 1871 expressly directs that upon the presentation of such certificates warrants for the work "*so done*" shall be drawn (Statutes, p. 11, sec. 8), Ordinance No. 814 provides for monthly measurement and certification of work; that the city shall issue warrants for the same, and that said warrants "shall be based upon and computed according to the measurement made as aforesaid." (Record, p. 342). The Law of 1872, authorizing the bonds, also plainly contemplates the continued issue of warrants in the first instance for work done, for it provides that all taxes collected for drainage "*and not required for the payment of drainage warrants*," shall be devoted to the purchase of bonds (Statutes, p. 14).

(*d.*) The plan is thus made perfectly apparent as follows: An engineer's certificate was to be made for work actually done; a warrant was to be delivered based upon such certificate for the amount due on account of such work; such warrant was to be paid in cash out of drainage funds if such funds were available; if there were no drainage funds, the bonds were to be resorted to as another source of payment for work done.

(*e.*) Besides, the Law of 1872 in authorizing the bonds declares in so many words that they shall be issued "for excavations and levees, drainage machinery and revetments."

(*f.*) Moreover, the testimony of Van Norden, the transferee of the Mississippi and Mexican Gulf Ship Canal Company, shows that the plan above indicated was exactly pursued in issuing the bonds. He says:

"When the work authorized under Act 30 of 1871, and various city ordinances in compliance therewith, had been performed, always as directed by the Administrator of Improvements of the City of New Orleans, the City Surveyor had the same carefully measured, and he then certified to the Department of Improvements the amount of work done. The said department then issued a certificate to the Department of Public Accounts; at once the Administrator of Public Accounts issued the drainage war-

rant which was an order on the Department of Finance. The warrants were paid at first to the company's representative and afterwards to the transferee, who presented them to the Administrator of Finance and requested that notice of such presentation and demand for payment be entered on the warrant itself, which was done, this act fixing the date when interest should begin. The warrant was then again taken by the holder to the Department of Finance and the administrator of that department within a day or two issued bonds in exchange therefor at ninety cents on the dollar" (Record, p. 370).

(*g.*) It appears from statements of bonds issued, that they were all actually given in exchange for warrants or in payment for work and material, connected with drainage (Record, pp. 423 to 434).

The first of these statements represents all the bonds exchanged for warrants given for work or material and drainage property, amounting to $1,672,105.21 (pp. 423 to 429). The second statement seems to comprise only those bonds exchanged for warrants representing drainage work, and the purchase of the company's rights and property, amounting to $1,538,764.12 (Record, pp. 430 to 434).

To say that these bonds not only paid this indebtedness of the city represented by warrants, but that they also paid another debt which the city owed the drainage fund upon its assessments, outdoes the character in fiction who, when he gave his note for a loan, congratulated himself that the loan was paid. Even he never went so far as to claim that his note paid two distinct and independent loans, each equal to the amount of the note.

2. When the question of payment is in controversy, the intention of the parties in doing the *thing* claimed to operate as a payment, is of controlling importance.

*Ketchum* v. *Duncan*, 96 *U. S. Rep.*, 659.
*Wood* vs. *Guarantee Trust & Safe Deposit Co.*, 128 *U. S. Rep.*, 416.
*Carter* vs. *Burr*, 113 *U. S. Rep.*, 737.

In this case it is quite clear that the City of New Orleans never intended to pay the assessment against her by the issuing of these bonds, and no one received them as such payment.

(*a.*) The formalities attending the delivery of the bonds and their exchange for warrants which represented drainage work have been already referred to. Further testimony on the subject will be found in the Record, pages 680, 681, 694, 695.

From this evidence it appears that the different officers of the city required upon a delivery of bonds, only a receipt stating the transaction and mentioning the warrants for work thus satisfied (Record, 476), or that the warrants themselves should be surrendered for cancellation (Record, 680), or that an order for bonds describing the warrants (which were exchanged) should be presented (Record, 694, 695). This was the entire transaction, and it shows that the only anxiety of the city was to thus extinguish warrants which represented drainage work.

(*b.*) It was the invariable habit to mark as paid on the assessment rolls, all drainage taxes that were satisfied or discharged by payment. And yet with these rolls in the hands of the city's officers and these officers constantly issuing bonds, no entry was made indicating the payment of any assessment upon lands and property still retained by the city (Record, p. 47). That small assessments upon lands sold by the city to individuals were paid by the purchasers, and when paid were marked off, adds significance to the fact that no indication of payments appeared against the other city assessments.

(*c.*) The judgments entered against the city upon assessments up to November 8, 1872, amounted to $215,686 20, as follows:

| | |
|---|---|
| 1st district, 1 t installment March 11, 1363... | $20,504 40 |
| 2d district, Parish of Jefferson, March 15, 1869 | 123,749 99 |
| 2d district, Parish of Orleans, November 11, 1868 | 71,431 81 |
| | $215,686 20 |

And yet up to that date drainage bonds had been issued for drainage work amounting to---------- $573 830 13 (Record, pp. 430, 431).

This certainly indicates that bonds were issued without the least reference to the judgments for assessments standing against the city and without any intention to pay them. It can hardly be claimed that the city was paying its judgments in advance; but the bonds on the date specified exceeded the judgments by $357,143.93.

(*d.*) On the said 8th day of November, 1872, judgment was entered against the city for the assessments levied against it, in the third drainage district, for the sum of $205,026.79 (Record pp. 172-175); and though on the theory of payment the bonds already advanced were largely in excess of the assessments made in this district against the city, no plea of that sort was interposed in the proceedings wherein the judgment was entered. It is expressly stated in the judgment that no opposition to the homologation of the assessment roll had been filed (Record, p. 172). Indeed, the proceedings for homologation and judgment were instituted by the city herself (Record, p. 170).

(*e.*) Up to the 15th day of March, 1873, bonds had been issued for drainage work amounting to $701,349.42 (Record, pp. 430-432). Judgment for assessments had then been entered against the city amounting to $420,712.99. And yet with an advance of bonds in her favor (upon this theory of payment) amounting to $280,636.42, a judgment for assessments against the city in the fourth district, amounting to $65,956.72, was entered on the said 15th day of March, 1873, without protest on her part or the plea of payment (Record, p. 188). Up to the 21st day of March, 1874, the bonds which had been issued for drainage work amounted to $1,129,529.21, while all judgments for assessments against the city amounted to but $486,669.71, and yet she permitted judgment to be entered on that date upon assessments against her in the first district for $231,168.50.

(*f.*) As bearing upon this question of payment and the intention of the city to pay its assessments by the issue of bonds, and as furnishing evidence as to how the city regarded these questions as late as the year 1885, the Court is referred to the pleadings in the action brought by the appellant Peake against the city, in which the judgments upon drainage warrants was recovered, which forms the basis for the present action. The petition as amended in that action contains the following distinct allegation:

"Petitioner further shows that the City of New Orleans is an owner of lands within the drainage districts created by the aforesaid act of the Legislature, and a judgment debtor for assessments levied on said lands to an amount exceeding $700,000, exclusive of interest, all of which should be paid and applied, as far as necessary, to the payment of the warrants of the petitioner" (Record, p. 210).

The answer of the city (pp. 204 to 209), filed January 19, 1885, contains no specific denial of this allegation and no plea of payment, but in every part of said answer it appears to be admitted that the plaintiff is fully entitled to all the benefits of the drainage fund. It contains this explicit language:

"Respondents admit that the holders of said drainage warrants are entitled to the benefit of all of said assessments, and of the proceedings and judgments stated in the bill, so far as they can be made effective and available as securities for the payment of said warrants" (Record, p. 208, fol. 362.)

The Court is also referred to the bill and answer in a suit brought in the Circuit Court of the United States by John Crossly & Sons, Limited, against The City of New New Orleans. The bill was filed August 24, 1883, by the complainants as holders of a large amount of drainage warrants, praying for a receiver, and, among other things, "that the City of New Orleans be adjudged bound and liable for the aforesaid assessments due by it" (Record, p. 566).

In the bill is the express allegation that the city is an owner of lands within the drainage districts and a judgment debtor for assessments levied upon said lands, aggregating $677,932.90, all of which is unpaid and should be paid and applied by the city to pay drainage warrants (Record, 564, 565, fol. 986.)

In the answer it is alleged that the lands of the city are not subject to assessments, but there is nowhere an intimation that the assessments against the city are paid (Record, pp. 568 to 576.)

(*g.*) In point of fact it does not appear that in any of the many suits, proceedings and contentions that have arisen concerning these assessments against the city and its property, has the plea of payment been interposed until it found a place in the answer in this cause.

And here it is not supported by an iota of evidence of the facts of payment or of the intention of payment on the part of the city or of the receipt of bonds as such payment by the parties for whom the drainage funds were held in trust.

In this condition of the proofs and with the affirmative considerations which have been suggested to the Court, the appellants may safely rest upon the finding of fact by the Master, as follows:

"That at the several times the said drainage warrants were exchanged for gold bonds, no intention was manifested by the City of New Orleans, nor by any financial agent thereof, to treat said bonds as payment of the judgments then outstanding against the City of New Orleans for assessments levied against the streets, public places and private property owned or held by the said City of New Orleans, but it was the intention of the City of New Orleans to pay for the work which had been performed by the said Mississippi and Mexican Gulf Ship Canal Company" (Record, p. 78, fol. 153).

3. *The bonds were properly issued as the general bonds of the city; and therefore the city as trustee made no error in either their form or terms, which entitles her to*

*be credited upon the judgments and assessments against her, to the extent to which she had relieved such fund.*

(See opinion of the Circuit Court, Record, p. 787, fol. 1409).

(*a.*) The entire proceedings in this project of drainage, and the different experiments resorted to and found ineffective before these bonds were authorized, tend to establish the fact that the issue of the general bonds of the city was an attempt by this means to make punctual payments on its contract for drainage when other means had failed.

(*b.*) As evidence that neither the city at the time the ordinance was passed providing for the issue of bonds, nor the State, when the law was passed authorizing their issue, intended that they should be paid out of the drainage fund, stands the fact that there was not enough due on assessments at either date to pay the amount estimated to be necessary to finish the work; and therefore not enough to redeem the bonds which might be issued for that purpose. The city came into possession of the assessments, and judgments recovered thereon, by virtue of Act 30 of 1871, which went into effect in March of that year. Assessments had not then been made in the third and fourth districts, but the rate and area had been fixed and the amount of assessments was ascertainable. On page 610 of the Record will be found a statement showing the entire assessments and the amounts which had been collected in the first and second districts up to 1871. Deducting such collections it appears that all the unpaid assessments which were transferred to the city for collection, with such as were afterward levied, both against individuals and the city, amounted to $1,699,737.16. There must have been less than that in 1872 when the law was passed authorizing the issue of bonds.

But on the 23d day of March, 1871, the City Surveyor reported to the Mayor his estimate of the cost of a thorough system of draining, with adequate machinery,

amounting to $3,000,000 (Record, pp. 339, 340); and apparently for the scheme specifically laid out by the Law of 1871, he estimated the cost at $1,934,460.

The ordinance providing for the issue of bonds to pay for this drainage was passed after this report and on April 27, 1871.

So if the bonds were to be payable out of the assessments constituting the drainage fund, we find the city and the State providing for the issue of obligations payable out of a fund which it was then apparent could not possibly be sufficient for that purpose.

(*c.*) There is no provision either in the ordinance or statute of 1872 limiting the payment of the bonds from the drainage fund.

On the contrary, the language of both is opposed to such a limitation.

The ordinance provides that they shall be "*bonds of the city*, bearing eight per cent. interest, payable semi-annually, having ten years to run, and *with due provision for retiring* the same and securing the punctual payment of interest and *gradual extinction of the principal*" (Record, p. 342).

The statute provides that "the city may issue from time to time, *as they may be required*, bonds of the denomination of five hundred and one thousand dollars, *having fifty years to run*, and bearing seven per cent. interest, principal and interest payable in gold in New York or New Orleans, or any other point that the Council may designate, with quarterly coupons, and that *the bonds thus issued shall be called the New Consolidated Debt of New Orleans*" (Statutes, p. 14).

The subsequent provision that bonds issued for excavations and levees authorized by the Law of 1871, and previous laws, should be marked "Drainage Series," and that taxes collected for drainage and not required for the payment of drainage warrants should be devoted to the purchase of bonds issued for drainage, comes very far from limiting their payment to the drainage fund. Nor would

this result follow if the entire drainage fund was set aside for their payment, unless the bonds provided that their payment should be limited to that fund (*United States ex rel. Ranger* v. *The City of New Orleans*, 98 *U. S.*, 381; *U. S. ex rel. Wolff* v. *New Orleans*, 103 *U. S.*, 358). They were still bonds of the city, and part of "the New Consolidated Debt of New Orleans." The fact that they had fifty years to run, with quarterly coupons, and that they were to be payable in New York or New Orleans, or such other point as might be designated, is quite convincing proof that they were to be ordinary municipal bonds to be put upon the market.

(*d.*) The issue of these bonds began in May, 1872, and continued through every month until December 31, 1874, and no question was ever raised as to their force or effect. During this time collections from assessments were made so slowly, through the fault of the city or otherwise, that it gave a very discouraging aspect to the fund from which more than $1,600,000 of bonds were to be paid. From 1871 to 1876 only $189,245.13 of assessments was collected (Record, p. 610). And yet this condition of the fund does not seem to have arrested the attention of the party issuing the bonds, nor of the party receiving them in payment for work performed.

(*e.*) That the payments for draining, otherwise than from these drainage assessments, was not altogether foreign to the intention or contemplation of the Legislature, is gathered from certain language used in Act No. 16 of the Laws of 1876, "To authorize the City of New Orleans to assume exclusive control of all drainage works in the drainage districts" and authorizing the purchase by the city of the right and drainage property of The Mississippi and Mexican Gulf Ship Canal Company and its transferee.

In the 4th section of that act it is provided as follows:

"The City of New Orleans shall alone have the power,

either through its own officers and employees or by contract to the lowest bidder, to do all canalling, dredging, ditching, or drainage work required to be paid for by assessments upon property *or from the City Treasury.*"

4. *Nor is it true as held by the Circuit Court, that even if these bonds were the general bonds of the city, they were nevertheless to be charged against the drainage fund, and that the city was a creditor to that extent of the fund.*

The language of the opinion of the Court on this subject is as follows:

"Referring to the act, we find the bonds were to be marked 'Drainage Series,' were to be paid out of the drainage fund after the payments of the warrants, and that no other provision whetever was made for retiring or paying the principal. We think it clear that bonds thus to be issued by a trustee, even if they were intended to be absolutely his own, and thus to be paid, were intended to be charged against the fund, and that the city (became) a creditor to that extent of the fund" (Record, p. 787).

(*a.*) The language of the Act of 1872, to which reference is made, is as follows:

"All (bonds) issued for the excavation and levees authorized by Act 30 of 1871, or by drainage laws previously enacted, shall be marked 'Drainage Series,' and all taxes collected for drainage and *not required for the payment of drainage warrants,* shall be devoted *to the purchase,* from the lowest bidder, of bonds issued for drainage; *no bid to be accepted above par, and the right reserved to the Council to reject all unsatisfactory bids*" (Statutes, p. 14).

This language operates primarily and directly, not upon the bonds but upon the taxes collected for drainage, and directs that the surplus *not required* for the payment of warrants, shall be used for the purchase (*not payment*) of bonds marked "Drainage Series." It was quite evident that while the work lasted and while warrants were being con-

stantly issued for such work, there could be no drainage funds not required for the payment of warrants, and thus available for the purchase of these bonds. The reasonable meaning of the words used is, that after the work was completed and all warrants therefor had been paid in cash from the fund, or by bonds if the money was not in the fund, then only might such assessments as should thereafter be collected and no longer required for the payment of warrants, be used for the *purchase of* bonds. In no event is it declared that the bonds *should be paid* from such remaining assessments.

But what entirely destroys all pretense that this statute absolutely directed the *payment* or even the *purchase* of these bonds from the drainage fund, is its further terms as plainly as possible expressing the idea that in no case was the holder of bonds obliged to offer them to the city for sale, and in no case was the city obliged to accept such offers of sale as might be made. The purchase was to be made from "the lowest bidder," meaning, of course, the holder offering to sell at the lowest rate; no bid was to be accepted above par, *and the right was reserved to the Council "to reject all unsatisfactory bids."*

Surely there is nothing here which requires the holders to sell their bonds; the city could not pay more than par for them, and in no event was she obliged to take them, whatever price, below par, might be fixed upon them by the holders. The city and the holders were merely permitted to trade if they could agree upon a price; and, if they agreed, the city was allowed to use drainage funds, not required to pay for work represented by outstanding warrants, and lying idle in its treasury, in purchasing and stopping interest upon its bonds, having by their terms, fifty years to run.

The statement in the opinion of the Circuit Court that except as the bonds might be paid from the drainage fund, "no other provision whatever was made for retiring or paying the principal," it is submitted, is utterly irrelevant, because it is not usual, nor was it at all necessary, that there should be any provision for their payment.

In *The United States ex rel. Ranger* vs. *The City of New Orleans*, 98 *U. S.*, 381, a provision of statute that certain railroad stock should be forever pledged for the payment of bonds issued by the city, was entirely disregarded as a limitation of the source from which the bonds should be paid.

In addition to what has been said, especially applicable to the words "and thus to be paid," in the above clause of the opinion of the Court, and claiming that the bonds were not "thus to be paid,"—that is, from the drainage fund, after the payment of warrants,—it is insisted that the remaining language of the clause involves a confusion of terms and an inadvertence of expression which give such language undue force and persuasion.

The bonds were not issued "*by a trustee.*" They were issued by a city under its ordinary municipal power, and by statutory authority. They were issued in the discharge of that municipal duty which enjoins the care and protection of the health and welfare of the city's inhabitants.

The city was a trustee of the drainage fund, made so by Act 30 of the Laws of 1871, which required the district draining Commissioners to transfer to the Board of Administrators of New Orleans "all moneys, assessments and claims of drainage" and all other drainage property, which "subrogated" said board to "all the rights, powers and facilities possessed and enjoyed by the Commissioners of the several draining districts, which commanded the said Board of Administrators "to collect from the holders of property within the said district the balance due on the assessments * * * in time to provide for the payment of the warrants to be issued to the said company at the date of their issue," and which further provided as follows: "That all money or moneys received by the said Board of Administrators from the said Commissioners of the drainage districts, either from the sale of property received from the said Commissioners, from the collection of claims for drainage now due, from the collection of drainage as-

sessments and from any of the sources of revenue contemplated by the provisions of this section of this Act, *be placed to the credit of the Mississippi and Mexican Gulf Ship Canal Company and held as a fund to be applied only to the drainage of New Orleans and Carrollton* in accordance with the provisions of this act; and that all property, not money, so received, shall be held *in trust for the payment of said Mississippi and Mexican Gulf Ship Canal Campany, and ultimately for the benefit of New Orleans, should the same not be required for the work of drainage.*"

This is the trust we seek to have enforced. We, as transferees and assignees of the Ship Canal Company, are the holders of warrants issued for drainage work and drainage property which are still unpaid, and for the payment of which this trust was created. The city has never been discharged from said trust by our consent nor by any other authority, and we protest against the destruction of our trust fund by setting off against it bonds issued by the City of New Orleans having no other relation to our fund than arises from the fact that they were issued in payment of other drainage warrants.

(*b.*) The theory that these bonds were to be paid from the drainage fund after the payment of warrants being entirely insufficient, it is difficult to discover any other ground upon which they can be legally charged or set-off against the city's drainage assessments.

None of the statutes relating to the subject require or permit it. On the contrary, the Legislature having all the circumstances in full view and dealing at the same moment with both the bonds and the drainage fund, instead of providing in the Act of 1872 authorizing the bonds, for such a set-off or charge against the drainage fund, entirely omitted any hint of that kind, and merely gave the city a discretion to buy said bonds if offered by the holders, and if the city saw fit to buy, within certain limits, with the money in the fund not required to pay warrants.

(c.) No consent or intention to make such charge or set-off can be derived from the acts of the parties.

The city never manifested by her act the least intention to do this thing; and though she had plenty of earlier opportunities, she never claimed the right of such set-off and charge, until it appeared in her answer in this suit.

The issue of bonds in payment of warrants, ceased on the thirty-first day of December, 1884. But work was continued under the contract by Van Norden the transferee of the company, and warrants were issued therefor until June, 1876, when the right and property of the company and its transferee were purchased by the city, which assumed the further work of drainage. The warrants thus issued from January 1, 1875, to June 6, 1876, and now outstanding, amount to more than $680,000 (Record, pp. 535 to 542). There was no hope after January 1, 1875, of the issue of any more bonds in payment of this work. The decision of the Court releasing many of the assessments against individuals, and the unjustifiable conduct of the city in neglecting proper attempts to collect the remainder, substantially left the contractor nothing to rely upon as a source of payment for his work except the assessments against the city. It is fair to assume—indeed, the inference can hardly be avoided—that when the contractor continued the work until the city owed him more than $360,000 for work and $320,000 for property transferred, so far from consenting to the destruction of this fund by offset and credit on account of bonds, he relied upon it for payment. Nor are we left to presumption and inference alone on this subject. In the suit brought by the complainant in which judgment was recovered on the warrants, Van Norden, the transferee, was sworn and testified in relation to the work done and warrants issued therefor between January 1, 1875, and June 6, 1876, as follows:

"To carry on this great work I was compelled to pay cash for all labor and material, and *believing that the city would ultimately pay said warrants*, borrowed on them

various sums of money pledging them as collateral" (Record, page 237).

And the city and the State and the people of the State, invited the contractor to rely upon this fund as still existing and sufficient. The city accepted the work from month to month, after the issue of bonds ceased, and gave warrants therefor to be paid out of the fund. The law of 1876, under authority of which the drainage property was purchased by the city, and for which purchase $320,000 of warrants are still outstanding, provided that the warrants issued for said property should be paid out of the drainage assessments (Statutes, p. 16, sec. 3). Even the constitutional amendment which took affect January 1, 1875, and by reason of which the further issue of bonds was interrupted, provided that the same should not be so construed as "to prevent the issue of drainage warrants to the transferee of contract under Act No. 30 of 1871, payable only from drainage taxes and not otherwise."

This conduct and these provisions amounted to representations, not that the fund had been exhausted by credit and offsets growing out of the issue of bonds, but that an adequate drainage fund was still in existence, and that warrants drawn upon it meant something worthy of a business man's attention.

Instead of finding anything in the acts of the parties tending to show that there was a consent or intent that the bonds issued by the city should be set-off against the fund, a condition is found which fully justifies the position that the city is estopped from denying the existence and non-impairment of the fund.

(*d.*) The set off and charge against the fund here claimed to exist, does not arise by operation of law. On the contrary, the general rules of law are opposed to such an offset in favor of a trustee. It is like a trustee relieving himself from liability as such by setting off his individual

demand against those interested in the enforcement of the trust.

This the law will not permit.

*Sawyer* v. *Hoag*, 17 *Wall.*, 622.
*Williams* v. *Hill and others*, 19 *How.*, 246.
*Cook Co. National Bank* v. *United States*, 107 *U. S.*, 445.

## III.

**The city as trustee is liable to the holders of drainage warrants upon three further grounds:**

1st. Because she has unjustifiably, and in violation of her duty as trustee, failed to collect assessments due the drainage fund.

2d. Because she has failed as the subrogee of the Mississippi and Mexican Gulf Ship Canal Company, and of Van Norden its transferee, to continue the work of drainage and thus secure, under the decisions of the Louisiana Courts, the collectability of such assessments.

3d. Because she has expended and paid out moneys collected and belonging to the fund for purposes not contemplated or permitted by the law creating the trust.

The presentation of the facts and argument in support of these ground of liability will be largely left to other counsel for the appellants in this cause.

The city only collected in cash from assessments against individuals, between 1871, when she became trustee, and July, 1876, about the date of her purchase of drainage property and her undertaking drainage work, in all the drainage districts, without interest, $78,748,51, and in warrants in payment of taxes, $151,174.18, making in all but $229,922.69.

And since the city bought the property of the drainage contractor and succeeded to his rights in June, 1876, though by that very purchase she added $320,000 in warrants to the more than $360,000 then outstanding for work performed, she had collected up to October, 1888, in cash, only $40,943.21 and in warrants, $64,688.79 (Record, pp. 435, 610); and this was after mandamus proceedings had been instituted to compel the city to do her duty in that behalf.

While the issue of bonds continued, the condition of the drainage fund was not immediately important to the contractor; but they ceased January 1, 1875, and then the collection of drainage assessments was a matter of more interest to warrant holders, and thus the mandamus proceedings were resorted to.

The answer of the city to the alternative writ affords proof that her neglect was deliberate and willful.

She denies the right of Van Norden "to stand in judgment herein;" and though she had been accepting his work for three years and delivering him warrants, she alleged that the ship company could not assign or transfer its rights to him; that there was no law requiring her to seize and sell the property assessed without first endeavoring to collect the assessment by means less harsh and injurious, and that she was not without discretion to issue such writ, or not so to do, and could not be compelled thereto by *mandamus* (Record, pp. 327, 328)

This represents a strange conception of the duty of a trustee.

But it was after June, 1876, when the city had secured the completion of two-thirds of the work, and had cut loose from the contractor who had performed such work, and had herself assumed its further prosecution, leaving in his hands and those of his transferees, more than $680,000 in warrants, representing his work and property, that the city and State were emboldened to indulge in more outrageous neglect and downright affirmative disregard of duty and of rights.

The city entirely abandoned the work (Record, pp. 272, 493, 498).

The machinery and boats, for the purchase of which $320,000 in drainage warrants were issued in 1876, instead of being used by the city to further prosecute the drainage work, so that these warrants and others outstanding for work performed might be paid from assessments collected, were allowed to rot and be destroyed for any useful purpose; and in 1878 the Common Council of the city ordered them broken up and sold (Record, pp. 318, 319, 320 and 272). In the meantime the drainage canals have been allowed to fill up, and according to the report of the Commissioner of Public Works made in 1888, "are in a most unsatisfactory condition" (Record, p. 527).

On the 5th day of April, 1881, this trustee, by its Common Council, actually passed an ordinance authorizing the Mayor to issue his proclamation advising the people not to pay drainage taxes until the question was decided by the Supreme Court.

And such a proclamation was issued the next day (Record, p. 321).

In 1877 the Legislature passed a law (No. 48, Statutes, p. 17) relieving a large part of the drainage territory from the payment of drainage taxes, and cancelling the judgments creating liens on said lands for assessments.

In the same year another law was passed (No. 67, Statutes, p. 18), declaring the true intent and meaning of the laws for draining, under which liens and privileges are recorded against property, to be, that no assessments for drainage or judgments for the same shall be collected from the property drained or its owners, until after there has been conferred upon the property such improvements by canals and adequate machinery as will effect drainage equal in value to the assessment exacted from said property.

Said act also declared that any assessments or judgments embracing the same, should operate only upon the property assessed, and relieved owners from all personal liability.

In 1882, by Act 20, Section 42, of the laws of that year, being a new charter of New Orleans, all laws providing for

the drainage of the City of New Orleans or portions thereof, and the collection of the drainage tax assessments, were repealed (Statutes, p. 19).

On the 17th day of April, 1883, this trustee, through its Common Council, passed an ordinance as follows:

"Resolved, That a Committee of Five be appointed to investigate and report whether or not drainage taxes are being now exacted and collected from parties selling real estate in the City of New Orleans, and against which property said drainage taxes have been recorded in the mortgage office, and by what authority said drainage taxes are being collected; heretofore how much has been collected and what became of the amount so collected; also whether or not it has been decided by the Supreme Court of the State that said drainage taxes are illegal" (Record, p. 476).

This ordinance has a sort of tone about it not unlike the ordinance and proclamation advising people not to pay their taxes, but very unlike the utterance of a trustee desirous of being faithful to his trust, or a municipality anxious and willing to pay its debts.

The report of the committee thus appointed, dated May 15, 1883, develops the spirit in which their investigation was set on foot.

Among other things it contains the following statements:

That there was not then, and had not been for some time, any forced collections of this tax by the city; that some of the tax was continually paid into the city in connection with transfer of real estate, which, when about to change hands and the purchaser demands a clear title, led to the payment of the tax, as it might cost less than to obtain an order of Court to cancel it; that if there were no drainage warrants outstanding the committee would cheerfully recommend an ordinance remitting or declaring null the tax; that a great portion of the tax, the committee were informed, could be easily annulled on the application of the parties in interest upon principles already laid down by the Supreme Court of the State, but that *if the city, by*

*any act of her own, should prevent the collection of the tax or annul it to the injury of the warrant holders, it was clear that some liability might arise against the city,* at least to the extent to which the tax might otherwise have been collected; that a decision favorable to the city in proceedings then pending would not change the situation, and would still leave open the *possible liability of the city in case she, by her own acts, prevented the collection.* The report concludes as follows:

"For these reasons your committee report that they are of the opinion that the whole subject should for the present *be let to exhaust itself* and work out its own solution; besides the most and worst is done and beyond remedy. The great bulk of the tax is paid. Those who still owe it are now, after the subject has been fully agitated *and* acted upon by the Supreme Court of the State on important points *informed that they may escape the tax by a resort to the courts,* and there is no other way to avoid it, *even under the Davidson decision.* The question of fact must be determined whether the particular land was benefited by the drainage. When the fact (is) shown that it was not, the Court will order the cancellation of the inscribed tax. No other power is competent to pass judgment, *and no one would be precluded by any action of the City Council"* (Record, pp. 478 to 479).

The plain inference from this report is that the action of the Council was taken with a view of some action on its part which would cancel all unpaid taxes and do away with the drainage fund; that the committee knew this, and were only prevented from recommending such a course through fear of fixing a liability upon the city and in favor of the holders of outstanding warrants; that to avoid such liability of the city, some other authority must annul the taxes, and that the owners of taxed land know or should know that an application to the courts would be successful; that the city might safely indulge in any neglect or passive violation of duty, but that affirmative acts preventing the collec-

tion of the tax would be dangerous, and *therefore the subject should be left to exhaust itself and work out its own solution.*

But the committee also reported that it was estimated by those who had had charge of the collection of drainage taxes that of the amount outstanding, other conditions permitting, the sum of one hundred and twenty thousand dollars could be collected.

Did the city as trustee make haste to collect this sum for the warrant holders? Not at all. On the contrary, it appears that the recommendation of the committee that the subject should be left alone to exhaust itself, was scrupulously followed.

An honest desire on the part of the city to learn and discharge her duty as trustee, would have surely led her to the knowledge that neglect breeds liability as surely as affirmative wrong doing.

The duty of the city to use all diligence in the collection of these taxes not only arose out of her character as trustee, but she agreed, in the transfer to her of the drainage rights and property, "not to obstruct or impede, but on the contrary to facilitate by all lawful means the collection of drainage assessments as provided by law, until said warrants have been fully paid" (Record, p. 253, fol. 433).

The findings of the Master on these questions, on pp. 80, 81, 82 of the Record, and his conclusions of law, from pages 83 to 89, are fully supported by the testimony in the cause.

## IV.

**The liability of the City of New Orleans as trustee of the drainage fund to the holders of warrants drawn thereon, arising from her neglect or misconduct, or her misappropriation of the money belonging to such fund, is not affected by the Constitutional amendment which took effect January 1, 1875.**

(See opinion of the Circuit Court Record, p. 784, fols. 1404, 1405).

This amendment provides that "the City of New Orleans shall not hereafter increase her debt in any manner or form, or under any pretext." It further provides that no evidence of indebtedness or warrant for the payment of money shall be issued by any officer of the city except against cash actually in the treasury. It permits the renewal of matured bonds, provided the debt is not increased, allows drainage warrants to be issued, payable from drainage taxes, and provides a heavy punishment for any violation of its provisions.

The Circuit Court holds that the prohibition of the constitutional amendment extends so far as to cut off the liability of the city for neglect or misapplication or diversion in her administration of the drainage fund (Record, p. 784).

After conceding that the contracts under the Law of 1871, out of which the warrants arose, could not be impaired by the constitutional amendment, and when discussing the claim made against the city for neglect, misappropriation and diversion, the Court declares, after speaking of the warrants issued for work, and those issued for property, that "with reference to both classes of warrants no rights could spring up which would increase the debt of the City of New Orleans to the holders of either class of warrants" (page 784, fol. 1404).

If this constitutional amendment is to be construed according to the ordinary rules of construction in such cases, the "debt" which it is declared shall not be increased, means the debt arising from securities issued, obligations entered into or new contracts made. This is what is generally understood by the "debt" of a city. The context mentioning "warrants," "evidence of indebtedness" and "bonds" show that it is dealing with debts as related to these things.

It is not possible, interpreting the language of the amendment in the light of the intention of its adoption, to so construe it as to give immunity to the city from every tort, malfeasance or misfeasance. It surely was not the intention to relieve by this language, the city from liabilities which have been recognized and redressed since the law and courts were known.

The case of *The United States ex rel. Ranger* v. *The City of New Orleans*, 98 *U. S.* 381 and the case of *The United States ex rel. Wolff* v. *The Mayor and Administrators of the City of New Orleans*, 103 *U. S.*, 358, have been cited to the Court. They were both cases in which the city of New Orleans sought to avoid levying a tax to pay its just debts. In those cases judgments had been previously recovered upon the city's bonds. In this case judgments have been recovered on the city's assessments and upon the city's warrants. The general judgments against the city in these cases were held to be conclusive as to the city's liability upon her bonds. We claim that the judgments entered against her upon her assessments fix her liability therefor in this case. She was in the cases cited ordered to pay her just debts, and we claim that she should not be allowed to escape payment to the fund, pledged to the satisfaction of our warrants, of her indebtedness to such fund.

The learned Justice who delivered the judgments of the Court in the cases cited, never better announced a high principle of law and morals, not altogether inapplicable to

the controversy now before the Court, than when he said in another case (Merriweather *vs.* Garrett, 102 U. S., 472):

"It is certainly of the highest importance to the people of any State that it should make provision, not merely for the payment of its own indebtedness, but for the payment of the indebtedness of its different municipalities. Hesitation to do this is weakness; refusal to do it is dishonor. Infidelity to engagements causes loss of character to the individuals; it entails reproach upon the State."

The decree of the Circuit Court should be reversed and the determination of the Master upon the accounting be affirmed, with proper directions as to further proceedings for the ascertainment of the holders of warrants entitled to participate in the drainage fund.

GROVER CLEVELAND,
*Of Counsel for Appellant,*

And for John Crossley and Sons, Limited,
Holders of Drainage Warrants.

Office Supreme Court U. S.
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# Supreme Court of the United States.

JAMES WALLACE PEAKE
vs.
THE CITY OF NEW ORLEANS. } IN EQUITY.
No. 1,234.

AN EXAMINATION AND REVIEW OF THE OPINION OF THE LOWER COURT.

RICHARD DEGRAY,
*Solicitor for Complainant.*

# Supreme Court of the United States.

No. 1,234.

JAMES WALLACE PEAKE
vs.
THE CITY OF NEW ORLEANS. } IN EQUITY. No. 1,234.

## AN EXAMINATION AND REVIEW OF THE OPINION OF THE LOWER COURT.

The opinion of the lower Court is to be found at pp. 782 to 787 of the record, and while it undoubtedly had the concurrence of the Circuit Judge, it is an emanation from the pen of the District Judge. It is, however, so unsupported by the evidence, and so erroneous in law, as to require a special examination and review at our hands.

That portion of the opinion embraced between the opening sentence and the paragraph beginning "The first question presented by the exceptions to the master's report," etc., may be taken as a substantially correct, but limited statement of the legislation of the State upon the matters of drainage.

It is, however, conspicuous by its omission to state when and how the city was, under the law, bound to collect the drainage assessments, which will be noticed hereafther.

The court observes. (Record, p. 783):

"The first question presented by the exceptions to the master's report and by the case itself, on the merits is, whether the city, as a municipal corporation, is indebted to the drainage fund for an assessment to the amount of some $700,000, upon the public streets and public squares," and then says :

"The legislature levied a tax upon a certain area, and by a subsequent act made the owners personally liable. It is difficult to conclude that the legislature ever meant to subject public things to a lien for a tax which, of course, would carry with it the right to foreclose the lien and sell the public thing.

"Again, it is difficult to see how the City of New Orleans, who is simply charged with the adninistration of a public thing, is an owner.

"As an original question we should be inclined to hold that the assessment levied was intended, by the legislature, to be put upon the property within the designated area, exclusive of the public streets and squares. On the other hand, the commissioners actually assessed the public streets and squares and put down the city as owner, apparently with the views of the Supreme Court of the State, as expressed in the Drainage Company case, 11 A., p. 377, decided under the drainage act of 1835, and the legislature thereafter (Act 30, of 1871), affirmed the assessment already made.

"This point need not be definitely decided by us ; as, even if the city owed the amount of this assessment to this fund it has, in our opinion, according to the proofs, much more than paid it."

We disagree entirely with the court on this question and say it must be decided whether the city was, and now is, indebted to the drainage fund, because the city has *not* paid one cent toward the drainage fund.

It is to be observed that the object of the present suit is not to enforce a lien, foreclose a mortgage or sell any property under a mortgage. The proceedings is one for an accounting, and under it, the sole question is one of debt, or no debt.

The assessments against the city were all reduced to judgments against her by courts of competent jurisdiction, after due notice and full hearing, and the simple question for this court is whether it will recognize the judgments of the State court thus rendered. No federal question is or can be raised for review in this court. Its duty is, therefore, plain under the constitution, and it is bound to recognize the judgments and accept the debt as fully established.

In United States vs. New Orleans, 98 U. S., p. 395. This court said :

> " In the present case the indebtedness of the City of New Orleans is conclusively established by the judgment recovered. The *validity* of the bonds upon which they were rendered, is not now open to question. Nor is the payment of the judgment restricted to any species of property or revenues, or subject to any conditions. The indebtedness is absolute. If there were any question, originally, as to the limitation of the means by which the bonds were to be paid, it is cut off from consideration now by the judgments. If a limitation existed, it should have been insisted upon when the suits on the bonds were pending and continued in the judgment."

On the same subject the Court of Appeals of New York said in Taylor vs Root, 4 Keys, p. 344 :

> "The cause or consideration of a judgment is of no possible inportance ; that is merged in the judgment. When recovered, the judgment stands as a conclusive declaration that the plaintiff therein is entitled to the sum of money recovered. No matter what may have been the original cause of action, the judgment forever settles the plaintiff's claim, and the defendant's assent thereto ; this assent may have been reluctant, but in law it is an assent and the defendant is estopped by the judgment to dissent."

In the First Drainage District, the first judgment was rendered on the first installment of said assessment, being 10% thereof. From this judgment the City of New Orleans appealed to the Supreme Court of the State, but afterwards abandoned the appeal (Record, pp. 374 and 384 and 385), acquiesced in the judgment against her, and paid a part of said judgment (which will be noticed hereafter) to Roselius and Phillips.

The judgments in this and the Second Drainage District were rendered prior to the passage of Act 30, of 1871, and the judgments against the city in the latter district she also acquiesced in by paying said Roselius and Phillips a part thereof.

Act No. 30, of 1871, (Statutes pp. 9 to 13), made exigible all the assessments and judgments in said First and Second Drainage Districts, as they appeared on the books of said districts, among which were said assessments against the City of New Orleans, duly reduced to judgments.

The act also commanded the city to make assessments in the Third Drainage District, and in such

other territory, as might be brought within the protection levees prescribed in the act, which, of course, meant assessment similar to those levied in the First and Second Drainage Districts.

The additional territory brought within the protection levees described in said act, was called the Fourth Drainage District.

The question of liability for an assessment against the city (as before stated) was one purely of State law and for State determination, and had the Circuit Court been willing to observe the State adjudications (not only the judgments in question but the adjudged cases, as to whether the city could be assessed on its public property, including the streets, it never would have made the palpable error set forth in its opinion on this subject.

In Marquez vs. New Orleans, 13 A., p. 319, the court said :

> "Plaintiff contracted with the City of New Orleans to level, grade and shell a tract twenty feet wide on Claiborne street, on the *north* side of the middle ground or promenade of said street, from St. Bernard avenue to the Elysian Fields street, in the Third District of the city, at the rate of $2.46 per running foot. The contract was performed by the plaintiff and his work accepted by the city authorities.
>
> "In payment of the work, the city delivered to plaintiff several bills, made by the street commissioner and attested by the Comptroller, against the owners on the *north* side of said shell road, in Claiborne street, including the entire costs of the aforesaid shelling.
>
> "The property holders refused to pay more than one-half of the amounts of the bills, on the ground that the

City of New Orleans is the *owner* of the middle ground or promenade, located in the centre of Claiborne street, and fronting said shell road, and also of all the intervening corner streets fronting on each side of the said shell road.

"The plaintiff then instituted suits on these bills against the property holders before the Third District Court of New Orleans; the court decided that the City of New Orleans, as *owner* of the strip of land in the centre of Claiborne street, should pay one-half of the shelling made in front of the same, and as *owner* of the intersecting streets at each corner should pay the whole of the shelling made there.

"Under these decisions plaintiff has instituted the present suit, claiming from the City of New Orleans $2,863.07; that is to say, requiring the city to pay the sum of one dollar and twenty-three cents per running foot for all work done in front of said middle ground or promenade, it being one-half of the price at which the contract was performed, and the other half being paid by the property holders opposite; and also the full sum of two dollars and forty-six cents for the shelling at the INTERSECTING STREETS, there being no property holders there to pay the same.

"Plaintiff obtained judgment in the court below and defendant appealed. There is no error in the judgment.

"Under section 119, of the city charter, the owners of the real property can only be made to pay the whole cost of the pavement of streets when they own property fronting on both sides of said pavement.

"In the case at bar, as the city owns on one front, if she were not liable, then only one-half of Claiborne street, and of streets similarly situated, could be paved.

"The city is obliged to make and pay for one-half of the paving in the case at bar, not only from the effect of section 119, of the city charter, but also because the middle ground in Claiborne street" (and which is really a

part thereof) " is the property of the city, and intended or dedicated as a public promenade, and for the public good and enjoyment.

" It is then just, where the city has property of this character that she should pay her proportion of expenses necessary for the construction of a public highway along the borders of her property, and not coerce opposite proprietors to pay the whole, and thus tax them in particular to enable the community to enjoy a pleasant promenade and free circulation of air."

The city is responsible not only for the neutral ground in the middle of the street, but also for intersections of the streets, where there can be no abutting owner.

The question as to whether the city could be assessed *as owner of the streets* came up again in the case of Correjolles vs. Succession of Louis Foucher, 26 A., p. 362.

This case is stated in the late case of Barber Asphalt Paving Co. vs. H. R. Gogreve, 41 La. A., p. 251, as follows:

"The legislature of 1868 enacted a statute authorizing the Police Jury of the Parish of Jefferson, left bank, to direct the construction of a shell road or Nicholson pavement from the upper line of the City of Jefferson, on St. Charles street"

(which is a board street, with wagon way on each side, and a neutral or public ground in the middle between said wagon ways, on which is located the tracks of the New Orleans and Carrollton R. R., and all forming St. Charles street),

"to the upper line of the City of Carrollton on the right hand side of the New Orleans and Carrollton Railroad

track, and to assess the property owners with the cost thereof. One Correjolles became the adjudicator of the work, and upon proper certificates of its completion he instituted suit against the succession of Louis Foucher, whose property fronted on the south or river side of said street opposite that on which the shell road was constructed. Our predecessors said in that case:

"The payment of the plaintiff's bill is resisted on the plea that the middle ground of the street, which is used by the New Orleans and Carrollton Railroad Company as a train way, is either the property of the railroad or the public, and, in either case, is bound to sustain its proportion of the expense of shelling the road. The defendant denies that his lands, lying south of the street, are bound for any part of the taxes. * * * *

"It seems the only question in which the defendant is concerned, presented in this case, was decided in Marquez vs. the City of New Orleans, 13 A., 320. In that case the court held that the middle ground of Claiborne street belonged to the city as a *locus publicus*, and that the city was bound to bear one-half expense of constructing a road on the north side of said street, the entire expense of which it was sought to impose upon the proprietors of the north side. That case and the one at bar seems to be identical. With that view of the case the Judge *a quo* decided in favor of the defendant, and we think correctly." (See also 11 La. A., p. 377.)

It is, therefore, clear on the authority of the courts having sole jurisdiction of the questions under consideration that the City of New Orleans, *as owner* of the streets, is liable for the assessments imposed thereon, and that the judgments of the courts homologating said assessments were correctly rendered.

That these judgments have never been paid we will show hereafter.

The second question discussed by the court is:

"Does the evidence show any such neglect, or misappropriation or diversion in the administration of the drainage fund as to make her liable as a municipal corporation?"

The court then says:

"It is important to observe that it is admitted that the early warrants drawn and out against the drainage fund up to January 1st, 1875, had been fully paid and retired; that the constitutional provision prohibiting the city's debt from being increased in any manner whatever, went into operation on that day, and the complainant's warrants were drawn afther that day.

"It has been urged that the contract of the Mississippi and Mexican Gulf Ship Canal Company, under Act No. 30, of 1871, out of which the drainage warrants arose could not be impaired by the constitutional amendment. This is conceded. But that contract stipulated only for the issue of warrants to be drawn against the drainage fund and the constitutional amendment allows this. But this does not help the complainant. The prohibition of the constitution was against the city increasing her own debt. The provision of the amendment was to increase as was desirable and proper, the debt of the drainage fund.

"These warrants being on their face and in express terms payable only from the drainage fund, and having been issued and all work not paid for having been done subsequent to the amendment, the original and subsequent takers of the warrants took them with the inhibition of the constitution stamped upon them and they cannot either by the orders of the city officials or in any other way be permitted to increase the city's own debt.

"It is also urged that a portion of the warrants viz: upwards of $300,000, of them was for the purchase

price of the machinery and contract which the legislature authorized the city to buy as provided in Act No. 16, of 1876. The answer to this argument, is that while the city was by the legislature required to buy, it was required to pay in warrants against the drainage fund. This class of warrants are placed therefore by the legislature in precisely the same category as the other drainage warrants issued for work. The holders were as far from having a claim against the city as were the holders of the other warrants against the fund; and with reference to both classes of warrants, no rights could spring up which would increase the debt of the City of New Orleans to the holders of either class of warrants.

"This view would in our opinion be conclusive upon this question even if it had been established that the city had violated any of its duties as a trustee.

"It is also urged by the solicitors of the complainant, that there is an equity in favor of the complainant which approaches that of a holder of purely negotiable security, in that there was a holding out on her part, that there was a fund when there was none available. We think that the facts of the case show that the city, under legislative mandate issued the warrants against a fund created by the legislature, and entirely separate from her own funds. This, the warrants disclosed in the plainest terms. There was no guarantee asked, given nor implied. The right was that of being paid out of a particular fund which was created and disposed of by the legislature. Hence, there can be no enlargement of the rights of the holder beyond that expressed in the instrument."

And the court next solemnly declares:

"Nor do we find in the record evidence of negligence on the part of the city which should be treated as waste or create any charge on the fund"

And then observes:

"The two grounds upon which this charge is sought to be maintained are: First, failure on the part of the defendant to collect assessments; and Second, failure on its part to push on the work of drainage whereby the land subject to the tax would have been rendered valuable enough to have paid the imposed tax."

As to the failure to collect, the court says:

"When these assessments had been handed over to the city, they had been assessed thirteen years, and for that period had been in the hands of the commissioners created expressly for the conduct of the drainage system, and with no other business."

And as a consequence, the court declares:

"If such bureaus had had failed to collect for such a period, the inference is strongly forced upon us that the assessments were substantially uncollectable, especially by a municipal corporation herself crushed by debts."

Then to substantiate this alleged inference, the court further declares:

"This is corroborated by the outcome of the mandamus proceedings taken by Van Norden, transferee of the company, and as warrant holder to compel the city to issue writs of *fieri facias* against owners in 1876."

And after saying the city answered to said application that the cost of the proceedings would equal in their opinion the amount realized, says:

"The result showed her estimate to be nearly correct for the cost of 125 writs selected by the warrant holders, and therefore presumably the best for the purpose was $34,000, and the amount collected under them only $36,000.

"Whatever else we have been impressed with upon this ground of complaint has equal force when considered with reference to the second ground of alleged fault on the part of the city's failure to complete the system of projected drainage."

The court then solemnly announces:

"In our opinion the failure to collect and the failure to complete were due to the system of drainage as created and modified by the legislature, and would have occurred no matter who had been charged with its execution."

And the court undertakes to prove this, as follows:

"A brief statement of the leading features of the original scheme of the legislature, and its subsequent modifications will, we think, demonstrate this.

"The tax was arbitrarily levied upon each square foot of the district, at a uniform rate, without any regard to the value of the land. This, taken in connection with another provision that no land should be sold for taxes, unless the price it brought should be equal to the levied, rendered the collection of a large portion of the tax a sheer impossibility, as the land was worth less than the tax.

"It is urged by the complainant's solicitors that the completion of the system would have raised the value of the submerged lands, but this conclusion must rest upon the premise that those who were to do the work of drainage would be willing to look for payment to a tax to be collected out of submerged lands, which had not sufficient value to pay the imposed assessment.

"Then it is to be observed that the availability of the drainage assessments was still farther diminished by the act of the legislature which stripped the assessment of all connection with the owner, leaving no recourse ex-

cept against the land taxed, and the Supreme Court of the State held that land should not be subject to any assessment which had received no benefit."

The court then sums up this branch of its inquiry as follows:

> "A final embarrassment which any trustee would have found difficult to overcome should be mentioned, viz: That by Act 30, of 1871, the legislature selected a contractor and fixed the rate per cubic foot to be paid for excavations at within fifteen cents of three times the original estimate for the work, and, though the system was less than $\frac{2}{3}$ completed, the amount of excavations in cubic feet, as determined by the proper authority selected by the legislature, was double that upon which the assessment were calculated. And it may be added that the city was entirely without means to prosecute the work to completion. She was prohibited by the constitution"

(only adopted in 1874 and going into operation January 1, 1875),

> "from in any manner or form increasing her debt; the drainage funds were, as shown herein, inadequate and uncollectable, and already burdened with a debt of over $600,000 on account of drainage warrants outstanding. In short, the system of drainage has remained incomplete and failed because it was an unwise and an inadequate system, where every motive springing from cupidity was against its success, and where provision, originally inadequate, was consumed by extortionate prices established by the legislature itself."

We will now review this branch of the court's opinion at length, and undertake to show, by the facts proved in the case, and by the law, that in every material point it is without foundation in fact or law.

It is true that the drainage warrants issued prior to January, 1875, have all been retired, but this was by the issue and delivery of the bonds of the City of New Orleans for all of said warrants (Record, pp. 430 to 434), save $23,666.59 thereof, which were paid in cash from drainage funds (Record, pp. 435 and 466), and that the constitutional amendment prohibiting the city from increasing her indebtedness went into effect on that day (Statutes, pp. 22 and 23.)

The court concedes that the contract of the Mississippi and Mexican Gulf Ship Canal Company, under Act 30, of 1871 (Statutes, pp. 9 to 13), could not be impaired by the constitutional amendment, but it does not go far enough. That act did not contain all of the contract between the City of New Orleans and the Canal Company. The company accepted the terms of the act as it originally became a law, and notified the city of its willingness and desire to go to work thereunder (Record, p. 338), but the city refused, and before anything was done, insisted upon furnishing an additional payment for the work done by the issue of its bonds in consideration of the company agreeing not to enforce the drainage warrants by suit and judgment, all as per Ordinance No. 814, A. S. (Record, pp. 338 and 339 and 340 to 342.) The terms of this ordinance the company also accepted by going to work thereunder (Record, p. 343), and further accepted the terms thereof by receiving the drainage warrants of the form and unto the stipulation in said ordinance provided for (Record, pp. 368 and 369.)

The terms of this ordinance, as to the issue of bonds for excavations, levees, etc., under Act 30, of 1871 (Statutes, pp. 9 to 13), and drainage laws previously enacted was ratified by section 13, of Act No. 73, of 1872 (Statutes, pp. 13 to 15), with only a slight modification as to the date when said bonds should fall due and the rate of interest they should bear. By relation this ratification went back to the date of the proposal by the city and the acceptance thereof by the company (which was before a shovel was put into the ground), and became part of the original contract of 1871, with the same force and effect as if said ratifying section had been incorporated in said Act 30, of 1871. This, the court should have recognized and held, could not be impaired by the constitutional amendment of 1875.

In fact, the debt of the City of New Orleans would not have been increased by the issue and delivery of the bonds in the above section provided for, after January 1, 1875, for that section, together with Act 30, of 1871, constituted a contract and contemplated the issue of bonds for the cost of the excavations, levees, etc., of an entire and completed system of drainage. This debt, then, of the City of New Orleans for drainage, was made and was always in existence after the modified ratification of said Ordinance No. 814, in said section 13, of Act No. 73, of 1872, and though not then due and demandable, was to become due, month by month, as the work progressed and was measured, approved and accepted by the City Surveyor until the entire system was completed.

It is also true, the warrants on their face purport to be drawn under Act 30, of 1871, and are made payable out of drainage funds, but they are so drawn, because this was the only law authorizing drainage warrants to be drawn at all, and because, drawn under and in accordance with that act, it does not at all follow that they are not fundable under section 13, of Act 73, of 1872, or that they are not beyond impairment by the constitutional amendment going into effect January 1, 1875.

Section 13 provided no formalities for the issue of the bonds therein provided for, and only declared they should be issued for the excavations to be made under Act 30, of 1871, and drainage laws previously enacted.

The mode of ascertaining the extent and cost of these excavations, for which the bonds were to be issued, under said section 13, was for the City Surveyor to measure the work done, certify the same, whereupon the city, through its proper offices, issued the drainage warrants which then became, in connection with said 13th section, of said act, but the exponent, representative and voucher for the excations and canals, or, in other words, they were the evidences of the excavations made and the canals dug, under Act 30, of 1871, and drainage laws previously enacted, for which the contractor was entitled to bonds, under said section 13, of Act 73, of 1872. They were not the contract between the Canal Company and the City of New Orleans, but a mere part of the machinery used in the mode

of payment, for the contract was contained in Act 30, of 1871, and said section 13, of Act 73, of 1872.

This was well understood by the city and the Canal Company, for the mode adopted in carrynig out the provision of Act 73, of 1872, was, first, to issue the warrants for the excavations and levees, and then to fund them into bonds. (Record, pp. 367 to 371 and 474 and 475.)

The court correctly states that it was urged in the lower court, there was an equity which approached that of a holder of a purely negotiable security, in that, there was a holding out on the part of the defendant (the City of New Orleans), that there was a fund, when there was none available, but the court's answer to this proposition in no manner meets the argument put forth by the complainant; for we admit the city, in issuing said warrants, acted under the mandate of the legislature, and that the same were drawn on a special fund and not againt her own fund, and that the warrant discloses this.

We further admit, no guaranty was asked, given or implied, and that the right of the warrant holder was that of being paid out of this particular fund, but this does not destroy his further right of recovering bonds, for he is entitled to both cash from drainage funds and bonds — the former under Act 30, of 1871, and the latter under section 13, of Act 73, of 1872.

Conceding (but for the sake of argument only) that section 13, of Act 73, of 1872, providing for the issue by the city of bonds for excavations, levees, etc., was re-

pealable and was revoked by the constitutional amendment forbidding the city to increase her debt, and that, thereafter, drainage warrant holders were not entitled to bonds of the drainage series, but were bound to look to the drainage fund alone, the simple question then is, is there not such a fund, and can the City of New Orleans in the face of the records of the courts, of her own records and official acts and statements made prior as well as subsequent to January, 1875, as well as in the face of the acts of the legislature, be heard to say there is no such fund, out of which the warrants in question are made payable?

When the warrants were issued, when they came in the lands of the complainant, when the judgment was rendered on them payable out of the drainage fund, against which they were drawn, there were then standing unpaid on the assessment rolls, against the City of New Orleans, as a drainage tax-payer, a drainage tax for about $700,000, exclusive of interest. There was standing on the records of the courts of the State of Louisiana, judgments homologating said assessments against the City of New Orlenns, unsatisfied, which the law made personal judgments against the City of New Orleans.

These judgments, under the law, had been accorded in the Mortgage Office, where the land they affected was situated, and these records remain in full force and uncancelled.

In February, 1875, the City of New Orleans furnished and filed, in the Superior District Court, for the parish of Orleans, a statement showing said city

owed drainage taxes to the drainage fund to the amount of $700,000, exclusive of interest. (Record, p. 335.)

When the judgment at law was rendered in 1877 (which is the basis of the present proceedings) payable out of drainage taxes, there was no pretense on the part of the city, there was no such fund, or that the indebtedness represented by the above assessments and judgments were paid, or that the city was not indebted to such fund.

The last bond issued by the City of New Orleans, under section 13, of Act 73, of 1872, was on the 30th of December, 1874, and the total amount of bonds issued, up to that date, was greater by several thousand dollars than the total amount of drainage tax judgments (including those against the City of New Orleans) that came under administration by the city, under Act 30, of 1871, and yet, after the last of these bonds had been issued, from which it is now for the first time claimed, the drainage fund became indebted for more than the entire amount of drainage taxes, including those against the City of New Orleans, the State of Louisiana adopted a constitutional amendment authorizing the further issue of drainage warrants payable solely out of drainage taxes. (Statutes, pp. 22 and 23.)

In February, 1876, the State of Louisiana, by Act No. 16, of that year (Statutes, pp. 15 and 16), authorized the City of New Orleans to purchase, from the Canal Company, all of its tools, implements and machinery, as well as its contract and franchise for

drainage warrants payable out of drainage taxes, and the city, under said authority did purchase said property on the 6th of June, 1876, and in payment thereof did issue and deliver to said Canal Company $300,000 more of drainage warrants payable out of drainage taxes.

Do not any and all of these acts mean there were and are drainage funds, out of which the unpaid drainage warrants given for the work done, and the machinery and franchise bought are to be paid? And do they not, independent of the declaration contained in section 13, of said Act 73, of 1872, that drainage taxes should first be used to pay drainage warrants, mean that the City of New Orleans, in face of her own acts, and in face of the acts of the legislature of the State, cannot now, for the first time, and in this suit, be heard to claim a payment of the aforesaid judgments against her as a drainage tax-payer, by reason of the issue and delivery of said bonds, under said section 13?

These unpaid judgments against the City of New Orleans, with interest, are alone sufficient to pay all the drainage warrants now outstanding.

In answer to the declaration of the court that it does not find, in the record, any evidence of negligence on the part of the city, which should be treated as waste, or create any charge beyond that on the fund, we will inquire:

*First*—Was there any drainage fund to collect?

*Second*—Was it collectable?

*Third*—What were the city's duties toward that fund?

*Fourth*—How has she fulfilled said duties?

*Fifth*—Is there any evidence in the record showing a disregard of duty and a waste of the fuud, which the court has been unable to find?

*First*—Were there any drainage funds to collect?

A resolution had been adopted by the Board of Drainage Commissioners, in the First Drainage District, imposing an assessment of $3\frac{3}{10}$ mills on each superficial square foot of land in that district (Record, p. 113), aggregating $751,401.80 (Record, p. 610), payable in ten annual installments, and one of said installments had been reduced to judgment (Record, p. 118), and been made exigible, and on account of said assessment there had been collected by said commissioners $79,448.67, in principal and interest (Record, p. 610), and there had been surrendered to said commissioners for the drainage assessments imposed thereon, unimproved lands to the assessed value of $171,239.11 (Record, p. 610), or nearly $\frac{5}{29}$ of the entire assessment in that district, leaving to be collected $500,714.02,

In the Second Drainage District there had been adopted by the Board of Commissioners therein, a resolution levying an assessment of 2 mills on each superficial foot of land in that district, payable in ten annual installments (Record, p. 113), and aggregating $681,750.45 (Record, p. 422), and all of these installments, or the entire assessment, had been made exigible by judgment of court. (Record, pp. 147 and 148.) Of this amount there had been collected by the commissioners in that district $255,-

492.95, in principal and interest, and there had been remitted by act of the legislature the ninth and tenth installments of said assessment aggregating $136,350.10, leaving to be collected $289,907.40. (Record, pp. 421 and 610.)

In the Third Drainage District nothing had been done by commissioners therein, nor had any been appointed, but there was levied by the City of New Orleans, pursuant to Act 30, of 1871, an assessment of 2 mills on each superficial foot of land (Record, p. 114), in that district, aggregating $627,589.95 (Record, pp. 169 and 170), and this was made exigible by judgment of court. (Record, p. 610.)

In the Fourth Drainage District there never were any commissioners; in fact, this district was created by Ordinance No. 1359, of the City Council, and an assessment was levied therein by the City of New Orleans, pursuant to said Act 30, of 1871, of 2 mills on each superficial foot of land in that district, aggregating $281,416.81. (Record, pp. 114 and 610.)

The total in all the Drainage Districts which came under administration by the City of New Orleans was $1,696,637.16.

*Second*—Was this sum collectable?

The city collected out of this sum, exclusive of interest, between June 1, 1871, and October, 1888, seventeen years and four months, $273,401.85 (Record, p. 435), or about $16,000 per year on an average, leaving a balance of $1,423,235.31.

The entire assessment was imposed on the terri-

tory now comprising the land within the corporate limits of the City of New Orleans.

The assessment in the First Draining District amounted to $141 per acre, and in the three remaining districts to $87, except in the Second District where the legislature, in 1869, remitted the ninth and tenth installments, making the assessments in that district $69 per acre.

The City of New Orleans is the gateway of the great Mississippi Valley, the metropolis of the South. Can it be that the land within her corporate limits is not worth $140 per acre in the First Draining District, and $69 in the Second Draining District, and $87 in the Third and Fourth Draining Districts.

It is true there is much unimproved land embraced within the limits of the City of New Orleans, but as we have already seen nearly $\frac{5}{20}$ of the land in the First District was surrendered for the taxes as unimproved land (which would embrace the great bulk of that kind of land), and a little over 10% thereof had been collected by the Commissioners, leaving about $\frac{7}{10}$ to be collected, and this exclusive of the taxes on the bulk of the unimproved land. This district is the heart of the City of New Orleans, and covers the most populous and valuable part of the city. Can it be that $\frac{7}{10}$ of the land in that district is not worth $141 per acre?

In the Third and Fourth Districts not a dollar had been collected prior to the 30th of June, 1871, both of which front on the Mississippi River and only one of which (the Third) runs back to Lake Ponchar-

train. After that date the city collected in the Third District $100,118.65 and in the Fourth District $39,945 up to October, 1888, making a total of $140,063.65 face of assessments collected in said district. Can it be that not more than 16 per cent. of the Third Drainage District, and not more than 14 per cent. of the land in the Fourth Draining District is worth $87 per acre?

In the Second District, which was less improved and less valuable than any of the districts, there had been collected up to October, 1888, $298,121.25, or over 50 per cent., of the amount levied in that district. Why was this large amount collected in this comparatively unimproved district and so little collected in the most valuable and improved districts?

There are to be found in the record extracts from various bills of sale of land in the unimproved and suburban portions of the First, Second and Third Districts, showing sales of land from time to time for far more than the amount of taxes thereon, and notably among these are the sales from the New Orleans and Canal Banking Company to G. L. Bright, and from Bradish Johnson to various parties. (Record, pp. 398 to 405.)

Nor is this all. There are also to be found in evidence some twenty-six bills of sale of land from various parties to the City of New Orleans, lying along the lines of the Orleans and Poydras canals and all in the unimproved part of the City of New Orleans, each of which shows actual sales of land to said city to be excavated as canals for amounts far in

excess of the drainage taxes levied thereon. (Record, pp. 349 to 367.)

But the collectability of the assessments did not alone depend on the value of the land on which they were imposed. Act No 67 of 1861 (Statutes pp. 8 and 9) declared the homologation of the assessments should be a judgment against the land and the owner thereof on which execution might issue as in ordinary cases. This law, the court fully recognized, and rendered judgment against both the land and the owner thereof. In the First Drainage District this judgment was rendered by the Supreme Court of the State, among the issues in that case were the ones (by Mrs. Rey, Record, p. 321) and one by Mrs. Davidson [Record, pp. 417 and 419], whether such personal judgment could be rendered. This latter judgment was sought to be reversed, in this court (96, U. S., p. 97), and among other reasons on this very ground but without avail. But further than this. The City of New Orleans herself owed to the drainage fund about $700,000 which, prior to the constitutional amendment of 1875, (if not thereafter) she could have paid by the issue and delivery of the 7% Gold Bonds, General Series, [but not of the Drainage Series], under section 13 of Act 73,of 1872, as part of the indebtedness of the City of New Orleans, and this sum, she can now pay, and could for a long time have paid to the drainage fund by the issue and delivery of the 5% bonds under Act No. 133, of 1884, (Statutes, pp. 25 to 29).

*Third*—What was the city's duty in regard to the collection of this fund?

The seventh section of Act 30, of 1871, provided that the Canal Company should have ready for work within 15 days after the passage of that Act (and it became a law by promulgation on the 14 of March, 1871), machinery of sufficient power to excavate at least 25,000 cubic yards of earth per month and should increase said machinery to at least a capacity of 50,000 cubic yards per month. The compensation under the Act was 50 cents per cubic yard. The work began June 1st, 1871, and hence $12,500 was required monthly at the outset of the work and this sum was increased to $25,000 monthly.

To meet the drainage warrants issued for the above excavations the ninth section of the act declared the Board of Administrators should collect said assessments *in time* to provide for the warrants given therefor *at the date of their issuance*, which were to be and were monthly $25,000, or $300,000 per year.

*Fourth*—How has the City of New Orleans fulfilled this duty? Have the drainage warrants been paid from drainage tax collections at the date of their issuance?

From July, 1871, to the date of the sale to the city, in 1876, there were issued by the city to the Canal Company $1,977,734.59 of drainage warrants for work done, approved and accepted by the city. (Record, p. 585.)

The amount collected during that time was:

| | |
|---|---|
| In cash | $ 78,748 51 |
| In drainage warrants received for tax | 151,174 18 |
| Total in principal and interest | $229,922 69 |

The collections from the date of sale, in June, 1876, to October, 1888, were:

| | |
|---|---|
| In cash | $ 40,943 21 |
| In drainage warrants | 64,688 71 |
| Total in principal and interest | $335,454 69 |

from June, 1871, to October, 1888. (Record, p. 435.)

But the face of the assessment collected, exclusive of interest, was, from June, 1871, to October, 1888 (Record, p. 435), $273,401.85, leaving the face of the assessments uncollected $1,423,235.81.

The total of cash collected up to October, 1888, was (Record, p. 435), $119,691.72.

Of this last sum the only amount thereof used by the city to pay drainage warrants was (Record, pp. 435 and 466), $23,666.59.

The drainage warrants issued for work done up to January, 1875, were taken up and retired by the issuance and delivery of 7% gold bonds, Drainage Series, under section 13, of Act 73, of 1872 (Record, pp. 430 to 434), which were never worth more than 90 cents on the dollar, and became as low as 26 cents on the dollar. (Record, p. 661).

The manner in which the balance of this $119,741.52 was disposed of will be noticed hereafter.

A face collection of $273,401.85 out of a face assessment of $1,696,637.16 in seventeen years and

four months, or a little over 16% collected, extending over that long period of time, is about as poor a showing as it is possible to conceive of, and can only be taken as a demonstration of the hostility of the city in the premises, and a violation of its duties as trustee, which we will now proceed to notice.

*Fifth*—Is there in the record any evidence of disregard of duty and waste of the drainage fund by the City of New Orleans which the court has been unable to find.

If neglect to enforce the collections of drainage assessments is waste, then the city has been guilty of the most wilful waste, for she has not only neglected to collect, but she has advised publicly the parties owing said assessments, and instructed them not to pay them, and further instructed how to have them cancelled and annulled without payment.

In December, 1873, the City of New Orleans, after having failed to collect the drainage taxes to pay drainage warrants at the date of their issuance, adopted Ordinance No. 2460, allowing the drainage tax payers to pay their drainage taxes in drainage warrants, compelling the contractor to sell his warrants at a discount of 15% or get no money at all, whereby he lost upwards of $30,000. (Record, pp. 234 and 235, 453 to 457, 630 to 631 and 645.)

With the drainage warrants falling due at the rate of $25,000 per month, and the funds out of which they were payable, enforceable by execution, which was grantable for the mere asking for its issuance, during three and a half years, the city merely opened

an office where the tax payer might pay if he desired, but took no steps whatever to enforce payment (Record, p. 643.) After having collected only $88,547.78 in said three and a half years, up to January 1, 1875 (Record, p. 231), and never having issued a single execution, the city denied and resisted the right of the drainage warrant holder to have the tax enforced by execution. (Record, pp. 327 and 328.)

The court, against the opposition and resistance of the city, some time during 1875 (Record, pp. 323 to 338, and 27 La. A., p. 497), granted the mandamus, and the collections, as a result, including January, 1875, and all the time occupied during that year by said mandamus proceedings to the date of the sale, in 1876, amounted to $150,729.30 (Record, p. 232) but after said purchase not a single execution was issued (save one in 1879, Record, p. 598), and the collections thereafter became next to nothing.

And not only during this time, but during all the time from June, 1871, to the present time did the City of New Orleans ever issue a single execution against any one or make the slightest effort to collect the tax from the owner, independent of the land on which the same was imposed, although the right was expressly given so to do by Act No. 67, of 1861 (Statutes, p. 9), and the judgments rendered thereunder. (Record, pp. 118, 383, 122, 148, 159, 172, 188.)

After said purchase the City of New Orleans was the only party authorized to do dredging and canalling for the drainage and protection of the property

within the limits thereof, and, being subrogated to all the rights of the Canal Company, and being possessed of all the necessary machinery to complete the system, deliberately abandoned the same, allowed the canals already dug to become filled with sediment and filth, and of no use, and suffered her machinery and dredge boats, purchased as aforesaid, to become worthless with rust and rot (Record, pp. 88, 89, 318, 319 and 320, 272 and 273, 492 to 495, 496 to 499, 525 to 530), while the boats and machinery were all in good order when received by the city (Record, pp. 40 and 41, 239 to 244.)

Because of this abandonment and the lack of benefits conferred by reason of the non-completion of the system, the courts of Louisiana decided in the case of Davidson vs. the City of New Orleans, 34 A., p. 170 [where $53,000 (Record, pp. 322 and 323), with thirteen years of interest, was lost to the drainage fund] that the tax could not be enforced.

In 1881, the city having abandoned all effort to collect assessments, the Council thereof instructed its Mayor by Ordinance No. 6970, to issue, and in pursuance thereof, he did issue and publish in the daily press, his proclamation advising the drainage tax payers not to pay their taxes until the validity thereof should be passed upon by the Supreme Court, (Record, p. 321), as if these tax rolls had not already been homologated by the courts and in the First Draining District by the Supreme Court of the State (27 A., p. 20) and affirmed by the Supreme Court of the United States (96 U. S., p. 97), or in

other words, so see whether the judgment of the lower court in the above Davidson case enjoining the payment of the drainage tax because of the non completion and abandonment of the work by the City of New Orleans would be affirmed on appeal, to the Supreme Court of the State.

In 1883, the Council of the City of New Orleans, by Ordinance No. 264, (Record, p. 476), provided for a committee to report whether or not, drainage taxes were then being collected and by what authority.

In May, 1883, (Record, pp. 476 to 479), the committee on drainage reported (and the report was duly published in the Council proceedings) declaring there were $120,000 of drainage taxes then outstanding and this was exclusive of 13 years interest—that might be collected, but that the city attorneys were not then and had not been for some time previous doing anything toward the collection of said taxes, and then the report elaborately and carefully instructs the drainage tax payers how they can be relieved by judgment of court under the authority of the Supreme Court in the Davidson case (34 An., p. 170), and ever after this decision [which was only made possible, and based upon the non-completion of and abandonment of the system by the City of New Orleans] it became the settled jurisprudence of the State to erase and annul all drainage taxes. Conspicuous among drainage tax judgments so erased are those against Geo. L. Bright, [Record, pp. 398 to 400 and 406 to 408, and

Bradish Johnson, [Record pp. 400 to 402 and 409 and 410], and to-day because of such settled jurisprudence not a dollar of this tax can be enforced.

Mr. Gurley, one of the city's attorneys does not agree with the city's committee on drainage in saying the city attorneys were doing nothing toward the collection of the tax and describes what he did was as follows: He waited until the tax payer died, went into bankruptcy or was sold out by the sheriff, and then he presented the drainage tax bill against the estate and asked for whatever driblet there might be left, or in other words he waited for the end of the man by death, natural or civil or disaster consumated by a sheriff sale and then asked for payment. [Record, pp. 652 and 653].

Such were some of the acts of omission and commission of the trustee toward the drainage fund, which it was its first and only duty to collect with the utmost diligence. They are all abundantly proven by evidence in the record but the court seems to have been unable to find them or find in them any breach of duty or waste of the fund. And the conduct of the State of Louisiana toward this fund has been worse.

In 1877, the legislature, by Act 48 of that year with about $700,000 of drainage warrants out and unpaid, passed a law relieving a large portion of the drainage territory from the payment of the drainage taxes imposed thereon, [Statutes, p. 17], and by Act No. 67 of the extra session of 1877, passed another law relieving the defendants from all personal

liability on drainage judgments rendered against them (Statutes, p. 18), and finally, in 1882, by section 45, the present charter of the City of New Orleans abolished all laws pertaining to drainage and the collection of drainage taxes. (Statutes, p. 19.)

Nor is it true, as stated by the court, that the drainage taxes had been levied thirteen years prior to the transfer to the City of New Orleans, in 1871, and had been under administration for *that time* by commissioners solely charged with their collection, and that the non-collection by them must be taken as a forceable inference that they were uncollectable.

The judgments imposing the mortgage on the lands to be drained had, under the law, to be first rendered, and they were rendered as follows:

In the First Draining District, August 24, 1861. (Record, p. 116.)

In the Second Draining District, Parish of Orleans, February 9, 1861. (Record, p. 157.)

In the Second Draining District, Parish of Jefferson, April 29, 1861. (Record, pp. 145 and 146.)

In the Third Draining District, May 4, 1872. [Record, pp. 169 and 170.]

In the Fourth Draining District, January 29, 1873. [Record, p. 182.]

After these judgments came the adoption of the resolution levying the assessments, as follows:

First Draining District, September 12, 1861, payable in ten annual installments. [Record, p. 113.]

Second Draining District, March 11, 1861, payable in ten annual installments. [Record, p. 113.]

Third Draining District, June 11, 1872 [Record, p. 114.]

Fourth Draining District, November 20, 1872. [Record, pp. 114 and 115.]

Nor were the taxes yet collectable under the proceedings thus far described. The amount due by each individual property owner had to be determined, and to this end assessment rolls had to be made, filed in court and had to be homologated by judgment of court, after due proceedings had, before the assessments became collectable, and these judgments were rendered as follows :

In the First Draining District, for the first installment, being 10% of said assessment, March 11, 1863, and for the nine remaining installments, March 21, 1874 [Record, pp. 118 and 122.]

In the Second Draining District, November 1st, 1868, and March 15, 1869. [Record, pp. 159 and 148.]

In the Third Draining District, November 8, 1872. [Record, p. 172.]

In the Fourth Draining District, March 15, 1873. [Record, pp. 188 and 189.]

Act 30, of 1871, under which the rights and duties of the Drainage Commissioners were handed over to the City of New Orleans, became a law by promulgation on March 14, 1871 [Record, p. 338], and the first official act of the city thereunder was the adoption of Ordinance No. 814, A. S. On the 25th of April, 1871 [Record, pp. 340 to 342], the mortgage proceeding and the assessments in the Third and

Fourth Draining Districts, and all the proceedings thereunder for their enforcement were conducted by the City of New Orleans after the subrogation to it under said act.

In these two districts, where not a thing had been done looking toward the levying and collection of the assessments therein [and in fact the Fourth District had not even then been created], the amount of the drainage tax was $909,015.74 out of the $1,699,637.16, with the collection of which the city became charged.

Nor is this all. All of the proceedings for the last nine installments of the assessment in the First Draining District, including the filing of the rolls and the judgment of homologation of the same were likewise conducted by the City of New Orleans. The amount of these installments does not appear definitely, but they certainly must have been $\frac{9}{10}$ of the $500,714.02, with the collection of which the city became charged in that district, or say $450,043.62, which, added to the said $909,015.74 in the Third and Fourth Districts, makes $1,359,659.36 out of said $1,699,637.16, leaving only $339,977.80 that was enforceable and collectable at the time of the transfer to the city, in 1871, and this last amount only became enforceable in 1868 and 1869, three and ten years before the transfer to the city and not thirteen years as erroneously stated by the court.

The assertion of the court, therefore, on this matter, that the assessments had been collectable for thirteen years prior to the transfer to the city, is without even a shadow of proof to sustain it.

Nor is the court any more fortunate as to the result of the mandamus proceedings sustaining its declaration that the assessments were uncollectable. The evidence shows [Record, p. 617], there were 1,571 executions issued on drainage tax judgments after July 13, 1875, [which was after the mandamus judgment by the Supreme Court], and between March 3, 1879, but another statement by the same officers [Record, pp. 593 to 598], shows there was but one execution issued after the sale to the city, in 1876, and this was in 1879.

Of these executions 613 were paid in full and 9 in part, and 949 were not paid at all, and as to these it does not appear what was done under them, or that anything was done.

The result accomplished by these executions was $32,466.69, paid over in cash by the Sheriff, to the City of New Orleans, which the statement says was inclusive of taxes, interest and attorneys' fees (but these belonged to the fund (Waples vs. Lacey, 28 A., p. 158), as the work was done by the attorneys of the City of New Orleans.)

The entire costs paid by the City of New Orleans was on 330 executions and amounted to $950.50. It is fair to presume this amount was taken out of the collections, and that the sum turned over to the city was the net amount, after all costs were paid. But suppose it was otherwise, then the net amount resulting from the forced collections, through the Sheriff's office, was $31,516.19.

The same Deputy Sheriff who signed the above

statement was not content to give the monied results flowing from the mandamus proceedings, but converted himself from an executive into a judicial officer, and declared that out of all the sales that took place under the above executions, only eight were *bona fide*, and he based (Record, pp. 757 and 758) his judgment, in this matter, on the sole fact that in only eight instances did the purchaser pay the amount of his bid, plus the amount of other taxes assessed on the property sold, and that, hence, although the purchaser paid the full amount of his bid in cash to the Sheriff, the sale was not genuine, because he would not and did not pay an additional amount for other taxes.

Had this would-be judge read the 7th section of the drainage act of 1858 (Statutes, p. 4 , declaring the mortgage lien and privilege imposed by that act, superior to all others, whether tacit, conventional, legal or judicial, he would scarcely have made the blunder.

The above was not the only result flowing from the judgment in the mandamus case. (27 A., p. 496.)

For the first six months in 1875, the collections were $25,075.95, and for the remaining six months $102,080.50, making a total for that year of $127,-156.45. (Record, pp. 231 and 232.)

The first writ of *fieri facias* issued, was on July 13, 1875. (Record, p. 617.)

Why were the collections in the last six months of that year, $102,080.50, and the collections in the

first three and a half years, prior to January, 1875, when no compulsory means were resorted to, only $88,547.78. (Record, p. 232.)

For the first three and a half years the assessments were newer and the land more valuable. Why were they only $88,547.78, as compared with the second six months of 1875, when they were $102,080.50? The only answer is that for three and a half years the city refused to do its duty, and for the other six months it did its duty but reluctantly and issued writs of *fi. fa.* under compulsion.

In 1876, the city bought out the Canal Company. No execution was issued thereafter, save one in 1879 (Record, pp. 593 to 598), while the city was doing all in its power to thwart the collections and repudiate the debt; and as a result, the entire collections for the twelve and a half years following June, 1876, were only $105,502.75. [Record, following p. 598.]

How then does the result of the executions, as shown by the collections, sustain the assertion of the court? In truth, they demonstrate that this assertion is entirely without foundation.

And, as to the court's declaration of the failure to complete the work, it is not true that the parties who were to complete the drainage system, would be obliged to look for payment to the tax to be collected from the land assessed.

The fact is, that no one, after the purchase in 1876, was authorized to do the drainage work, but the city, herself, as a matter of police administra-

tion. And, further than this, the completion of the work was compulsory on her, for there were about $700,000 of drainage warrants outstanding and unpaid, and payable out of drainage taxes, and these taxes were to be made collectable by the completion of the system and the draining and protecting of the land, whereby the same would have become of great value.

The city having the sole power to complete, and the means wherewith to complete, and the right of others being dependent on the completion, she was bound to complete her drainage system. 4 Wallace, p. 435.

That she had the power, is shown under the act of the legislature, pursuant to which the purchase was made [Statutes, p. 15 and 16], as well as by the act of sale subrogating [Record, p. 250] her to all the rights of the Canal Company. That she had the means to complete, is shown by the evidence, (Record, pp. 741 and 742) and by the master's report, pp. 86, 87, and 90, showing she had a reserved power of taxation more than sufficient to have raised by a yearly tax on the real and personal property within the city more money than was necessary to complete the work.

And how the provision of the Act of 1858, to the effect that no land should be sold for less than the drainage tax imposed thereon, could be a matter of so great a detriment to the drainage tax collection is hard to understand, for the Supreme Court, (27 A. p. 20) under the law of 1861, on

direct issue raised (see opposition of Mrs. Rey and Mrs. Davidson, (Record. pp. 231 to 419), rendered a judgment against both the land and the owner, upon which execution might issue against any other property of the owner, and this, if it had been availed of, would more than overcome any obstruction resulting from the provision of the Act of 1858.

And how a court of the dignity of the Circuit Court of the United States could hold that the value or availability of an assessment against which obligations were drawn, and were outstanding, could be impaired by an act of the legislature passed long after the assessment was levied and the obligation drawn against the same was issued and given, is beyond comprehension; for the contract for draining was in the Act 30 of 1871; and 13th section of Act 73, of 1872, (Statutes, pp. 9 to 15), and the drainage warrants given for the work thereunder were all dated and given prior to June 6th, 1876, while the act which purports to strip "the assessments of all "connection with the owner, leaving no recourse "except against the land taxed" was not passed until late in the year 1877.

And as to the decision of the Supreme Court holding "that the land should not be subject to any assessment which had received no benefit" this was only rendered possible and was based on the abandonment and non-completion of the drainage system by the city herself, and at a time when she was amply possessed of a taxing power sufficient to

have raised more money than was sufficient to have completed the system, and drained and protected the land, and which she abandoned and refused to complete simply because she chose to enter upon a scheme of repudiation rather than a fulfilment of her duties and obligations.

And in reply to the final embarrassment which the court states with so much positiveness, to-wit: "that the legislature selected a contractor and fixed "the rate per cubic foot to be paid for excavations "at within fifteen cents of three times the original "estimate for the work," we have simply this to say. The act of the legislature does not fix the price of any work per cubic foot, but per cubic yard, and further that we are at an absolute loss to understand the court, for there is not, in the record, the deposition of a witness, the statement of an engineer or other party, or a single hint from any source that any original estimate was ever made per cubic foot or yard, or in any other way, of the contemplated work at or prior to Act 30, of 1871.

It is true, as already stated, that after the act of the legislature was passed, (30, of 1871), and before the city undertook to discharge the duties imposed on her by that act a hurried and an approximate estimate was made by W. H. Bell, City Surveyor of the cost of the work contemplated by said act, which he put at $3,000,000 while the amount of the assessments available for drainage work was $1,699,637.12, and this lack of provision for the completion of the entire work was seen and known

before a spade was put in the ground, and because thereof the city with the company's consent (which was subsequently ratified by the legislature) provided the additional means needed by section 13 of Act 73, of 1872, and removed any and all difficulty that might arise on this subject.

And the further observation of the court:

> "That though the system was less than ⅔ completed the amount of excavations in cubic feet," (there were no cubic feet but cubic yards), "as determined by the proper authority selected by the legisture was double that upon which the assessments were calculated,"

Is equally fallacious, and;

First, as to the extent of the work completed. The exterior canals and protection levees were provided for in the act of the legislature; the interior canals were to be laid out by the city, and the system with all its details was under the direction of said W. H. Bell, City Surveyor, who certainly knew what the system was, and how near it was toward completion when turned over to the city in June, 1876, (which is the time of which the court is speaking) and he says the system was two-thirds completed, (Record, pp. 268 to 272). S. D. Moody, the general superintendent of the work, says it was two-thirds completed, (Record, p, 39) and E. C. Palmer, who was familiar with the system and the work done thereunder, and who loaned large amounts of money to the Canal Company for carrying on the work, says the system was two-thirds completed. (Record, pp. 507 to 517.) The only evidence to the contrary is that of Morgan Harrod (who has a plan of his own, and of a differ-

ent kind), and he admits he never saw any of the details of the system concerning which he is testifying, and who, when giving his evidence, did not know the extent and cost of the work done, and his evidence the master refused to accept, as not being based on the most reliable data. (Record, p. 91.)

*Second.* As to the assertion that the amount of excavations in cubic feet, as determined by proper authority, etc., was double that upon which the assessments were calculated, we repeat there is not a particle of evidence in the record, or elsewhere, that we know of to show upon what amount of excavation the assessments were based.

The total cost of excavations made by the company was $1,977,734.59. The price allowed under the law was 50 cents per cubic yard. The amount of excavations made at the above price would be 3,954,469 yards. According to these figures the court's assertion would make the original estimate (if one had been made) less than $1,000,000, but the original assessments in all the districts amounted to $2,205,917.89. (Record, p. 610.)

But the amount of yards excavated was even greater than the above, because many thousands yards were paid for at 12½ cents, and others at 37½ cents. (Record, pp. 619 to 629.)

Whatever the plans or costs of the contemplated works, whether they were the best or not, in no manner concerned the contractor or his transferees of the obligations given for the work done, for the plan was dictated by the law-making power, and

ample provision was made before the work began for the cost of its completion by assessments and bonds. The great mistake has been in allowing the city and the legislature to attempt to repudiate a contract duly entered into before the work began, for the completion of the entire system.

On the question of misapplication of the drainage funds collected the court remarks:

> "There are several charges, amounting to $100,000, which, it is urged, the city illegally allowed and paid out of the fund,"

and instances three kinds of such payments — to Roselius and Phillips, to clerks selected by Van Norden, and various City Attorneys.

The court then says the charge to Roselius and Phillips was clearly a charge on the fund, for it was for the saving of the entire fund.

A more grave mistake was never made, for it was never paid out of the fund, nor for saving the fund, but was *falsely* charged against the fund and thus used to exhaust the cash belonging to the fund.

Act No. 67, of 1861, provided (Statutes, p. 9), that the tax payer or assessee should pay the amount of his assessment, "and 10 per cent. in addition to the amount assessed, to pay costs and counsel fees," its clear intent and meaning being that the amount of the assessment should only be available for drainage, purely and simply.

The City of New Orleans was such an assessee and tax-payer and owed the assessments against her, in the First and Second Draining Districts, plus 10%

in addition to such taxes, to Roselius and Phillips, for conducting the legal proceedings which resulted in the judgments against her in these districts, just as each and every other tax payer owed a similar percentage, in addition to his tax. Or, in other words, the law provided, not that the drainage tax fund should pay the lawyers' fees, but that the drainage tax payer should pay such fees. There were two payments to be made by the tax-payer, one to the drainage fund for levees, excavations, etc., and one to the lawyers for conducting the legal proceedings.

The amount of drainage taxes, which the city owed in the First and Second Districts, was such an amount that 10% thereof (which she owed to Roselius and Phillips, in addition to the tax she owed to the drainage fund), amounted to $18,971.30, (Record, pp. 344 and 345), and this is the precise amount she has charged against the drainage fund as paid in cash out of that fund. (Record, p. 467.)

Now, as a matter of fact, it is not true that she made any payment in cash from such fund at all, for the same was paid as a city debt and not a debt of the drainage fund, by the issue and delivery of certificates of indebtedness, under Ordinance No. 882 [Record, p. 473], A. S., which were afterwards funded into bonds of the new "Consolidated Debt," general series, as distinguished from the drainage series, which could only be issued for excavations, levees and canals. [Record, pp. 518 to 521.]

The iniquity consists in using up the cash col-

lected, by charging the above sum as paid in cash, when no such payment was made, and when no such debt was due by the fund against which it is charged.

As to payments made to clerks, the court remarks:

> "That for the clerks selected by Van Norden, was imposed by the very act of transfer to the city was publicly recorded, and was well known, and was as subject to opposition in the courts as to resistance from the city, and was in good faith, intended for the benefit of the trust fund."

There is no doubt that as to the $320,000 of drainage warrants provided for in the act of purchase, and issued on the 6th of June, 1876, the court is correct, for the act of sale under which they were issued provided for the payment of clerks from the drainage tax collections, or, in other words, these $320,000 of warrants were encumbered with clerk hire, and the holders of these warrants cannot complain of such payment.

But on the 6th of June, 1876, there were about $360,000 of drainage warrants outstanding, and all issued for excavations and canals which Van Norden had disposed of, and which were in the hands of third parties before said sale was made (Record, pp. 87, 508, 650 and 651), and which said act of sale could not reach or encumber.

The warrants held by complainant, James W. Peake and Mrs. Mary J. Mitchell, intervening complainant, are of the latter class.

The amount of clerk hire charged against the cash collections is $52,006.65 (Record, pp. 435 and 458), and in this amount is charged the salary of the City Surveyor.

From June, 1871, when the city assumed charge, to January, 1875, she never attempted to charge the drainage fund with clerk hire (Record, p. 458), thus clearly showing she recognized during these three and a half years she had no right to make such charge.

From January, 1875, to June, 1876, there was no provision in any law, act of sale or agreement of parties, providing for the payment of clerks or City Surveyors, and it was during this time that all the drainage work warrants now outstanding were issued. Why, then, were such payments made? and were they not made wrongfully?

The duty of collecting and disbursing the drainage tax according to law was but an additional duty put on the city, but no provision was made for any additional payment of her officers and clerks.

If she had the right to charge for the additional services of clerks and surveyors why did she not have the right to charge for the additional services of her Mayor, Administrators and City Attorney, each of whom had, and did perform additional duties? That she had no right to charge for the services of the latter was directly decided in Waples vs. Lacey, 28 Ann, p. 158, not even from the funds which had been specifically collected as attorney's fees.

The fact is there were to be additional duties and

additional accounts kept, but they were to be paid for by the salaries already allowed to the city officials and clerks. Can the city now be held for these payments thus wrongfully made?

The city, while always showing a large amount of drainage taxes uncollected on the rolls, has never, prior to the present suit, made or exhibited any account of the sums collected, and the account now rendered, for the first time, shows the misappropriations. Can it be that, in a court of equity, such misappropriations, extending from January, 1875, to the bringing of this suit, and now for the first time made public, are to be held justified because not complained of before, and are they to be justified for all the time they have been taking place, even to the date of bringing this suit and thereafter?

The fact is, the city has simply paid from the drainage fund what she should have paid from her general fund. The former has been damaged and the latter has been benefited. Both funds are still in existence and under administration by the city. Why shall she not now take from the general fund, and restore to the drainage fund what she has wrongfully taken therefrom, for the benefit of the drainage warrants given for work done, prior to June 6, 1876, and which were in the hands of third parties for value, prior to the act of sale of that date? for it is not true that the holders of drainage warrants have slept on their rights or been remiss in seeking the collection of said warrants, as the records of the State Court and the Circuit Court will abundantly show.

See intervention of John Crossley & Co., in Davidson vs. New Orleans, 34 A., p. 171, of E. C. Palmer, in Succession of Patrick Irwine, 33 A., p. 64, The State *ex rel.* The Mississippi and Mexican Gulf Ship Canal Company, 35 A., p. 68, and the various cases to be found in the present record pages. [Record, pp. 543, 551 and 558.]

See also statement of money expended by John Crossly & Sons, limited, in cash and counsel fees, in the prosecution of drainage matters, aggregating $20,000. [Record, pp. 523 to 525.]

The court says there was $14,000 improperly paid to City Attorneys [but the real amount was $20,552.54; in the First District $6,423.84 [Record, pp. 88 and 226 to 230], in the Third District $6,620.35 and $3,264.85 [Record, pp. 88 and 435, and a partial detail of which is given at p. 226], in the Fourth District $4,243.50 [Record, pp. 88 and 435], and holds that these judgments fall within the same class as the assessments on the public streets and squares, and are paid by the bonds aforesaid.

The court finally concludes its opinion as follows :

> " There remains to be considered how much the city has paid out for the fund, by taking up warrants outstanding against it and substituting her own absolute obligations.
>
> " According to the master's report the city retired $1,600,000 of drainage warrants, and gave therefor her own absolute 7 per cent. fifty-year bonds. She did this under Act No. 73, of 1872. If, as we think, that act required her to issue bonds of the same tenor as the drainage warrants which she took up, i. e., payable out of

the fund, then the case would be that of a trustee, who, by an error, had paid out money or issued securities for the benefit of the estate of the *cestui que* trust, in which case she would be credited with the amount, to the extent to which she had relieved the fund.

"On the other hand, if the legislature meant to have the city issue her own bonds, it then becomes a question of legislative intent as to how the forced assumption should be treated.

"Referring to the act, we find the bonds were to be marked 'Drainage Series,' were to be paid out of drainage funds, after the payment of the warrants, and that no provision, whatever, was made for retiring or paying the principal.

"We think it clear that the bonds thus to be issued by a trustee, even if they were intended to be absolutely her own, and thus to be paid were intended to be charged against the fund, and that the city is a creditor to that extent of the fund, this would leave the city a creditor against the fund to the amount of $1,600,000; and if we should consider her a debtor to the fund to the amount of the assessments on the public streets and squares, and for the $14,000 paid to the City Atthorneys, in the aggregate to the amount of $714,000, it would still leave a balance in her favor of nearly $800,000."

The court then orders the master's report amended and the bill dismissed.

It is true that over $1,600,000 of bonds of the drainage series were issued to take up drainage warrants, but drainage warrants were but the evidences and vouchers for the excavations, for which the city was bound, in the plain language of the law, to issue her bonds from time to time, and these were not her bonds as trustee, but her own absolute bonds, and

simply because the debts for excavations and canals were her debts.

The original provision embraced in Ordinance 814, that the warrants should not be enforceable by suit and judgment, and if not paid in one year, from drainage taxes and assets, that then the city should issue its bonds, was not ratified in all its terms by section 13, of Act 73, of 1872, but the right to the bonds for excavations, levees, machinery, etc., was broadly and unqualifiedly given, without limitation, restriction or condition. The word loan, advance, assistance, or any equivalent term to signify anything of the kind, is entirely absent, but on the contrary, the plain language of the law, is that the bonds in question were to be called the New Consolidated Debt of New Orleans; and why the debt of New Orleans, unless the excavations for which they were issued was a debt of New Orleans, which was to be paid by their issuance and delivery.

It is true the bonds bore the mark of "Drainage Series," and for a very obvious reason, to-wit: to distinguish them from the other bonds authorized under the act, because they were entitled to be paid by any drainage tax collections not needed to pay drainage warrants, which the other bonds of the "New Consolidated Debt" were not entitled to.

But suppose, for the sake of argument, that the debts for excavations, levees, etc., were not debts of the City of New Orleans, and that the bonds of the "Drainage Series" were an advance and loan to the drainage fund, there can be no doubt that the hold-

ers of drainage warrants are also creditors of that fund, and the question then arises, who has the preference in the order of payment, the city for the bonds issued or the holder of the warrants for excavations, or do they stand on equal terms? The law under which the bonds were issued fixes this matter beyond all dispute, for it declares:

> "All taxes collected *and not required for the payment of drainage warrants* shall be devoted to the purchase from the lowest bidder of bonds issued for drainage."

To hold otherwise would be a clear defeat of the provision of the legislature creating an additional means for carrying on the work, and a violation of the law.

Nor does it follow, because the excess of drainage taxes not needed to pay drainage warrants might be appropriated to the purchase of bonds, that said bonds were not the absolute debt of the City of New Orleans. The lower court held to the contrary in similar cases, but this court reversed it in United States ex rel. Ranger vs. New Orleans, 98 U. S., pp. 381, 396 and 398, and in Wolff vs. New Orleans, 103 U. S., pp. 358, 360 and 369.

And, finally, in face of all the foregoing, and especially of the fact that the said judgments against the City of New Orleans remain unsatisfied on the records of the court that rendered them, that they remain uncancelled in the Mortgage Office where by law they are recorded, that they remain in full force on the assessment rolls in the bureau of drainage, where the originals are kept, that the City of New

Orleans, as late as February, 1875, (after the last bond of the drainage series, which are now claimed as payment, had been issued), furnished a statement in court showing the amount due by her was $700,000, that the State, by constitutional amendment as late as January, 1875, admitted the drainage fund was not indebted to the city by allowing drainage warrants to be drawn solely payable out of that fund, when the bonds then issued and delivered were greater than all the drainage assessments combined, that the legislature of the State, as late as 1876, admitted the drainage fund was not indebted to the city by providing for the purchase by said city of the dredge boats, tools and the franchise of the company by the issuance and delivery of drainage warrants payable out of drainage taxes, when, according to the theory of the other side, there were no drainage taxes to pay drainage warrants, because the bonds issued and delivered were greater than all the drainage taxes; that the city again admitted the same thing when she issued and delivered the drainage warrants thus authorized, and, lastly, when sued at law, in 1884, by the holder of drainage warrants purchased on the faith of all the foregoing, nor even up to the time of the rendition of the judgment therein, in 1888 (which is made the basis of the present suit), never for a moment pretended the drainage fund had ever become indebted to her on any account, but, on the contrary, in every place where evidence was to be looked for, in the statements of called for, in fact in every transaction that

she had had on the subject admitted her indebtedness to the drainage fund; in view of all these facts, when the present proceedings are brought to ascertain the amount of that admitted indebtedness, the court not only declares there is no such indebtedness, but, as an exercise of its *sound judicial discretion,* imposes on the complainant the entire cost of this proceeding for daring to ask how much that admitted indebtedness is.

Surely the judgment of the lower court should be reversed with costs.

RICHARD DEGRAY,

*Solicitor for Complainant.*

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# Supreme Court of the United States.

**OCTOBER TERM, 1890.**

*No. 852 and three other cases*

JAMES WALLACE PEAKE

*vs.*

THE CITY OF NEW ORLEANS.

## Reply to Supplementary Brief of Appellee.

In view of the fact that counsel for appellee states that the only additional points to which he desires to direct the attention of the Court are—

*First.* That the expressions in the opinion of the court in the Draining Company Case (11 La. Ann.) touching the assessments upon public property are *obiter;* and,

*Second.* That the oppositions of Patrick Irwin, W. O. Denegre, and others in the case reported in the 27th La. Ann. R., p. 20, were not passed upon by the supreme court of Louisiana nor by the Supreme Court of the United States on writ of error—

Counsel for appellants desire to present the following suggestions:

## First.

It became essential in the case reported in the 11th Annual for the Court to find that assessment upon the superficial feet or entire area of the land to be drained was a proper mode of assessment for drainage improvement.

The point was expressly taken that assessment upon the superficial feet was unjust and unequal, in that it took no account of the difference in value of different pieces of property.

Negativing this proposition, the Court took occasion to uphold this manner of assessment and also assessments upon public property by declaring that the assessment upon the superficial feet of property held by individuals was just as between such owners, and that it also answered the equities which had been urged upon the Court, growing out of the fact that much of the property in the district to be drained was public property and ought to bear a share of the drainage expense to the relief of individual property-owners.

Thus it will be seen that the liability of the city for its share of such improvement was absolutely essential in the disposition of the questions presented in that case.

## Second.

As to the oppositions of Patrick Irwin, W. O. Denegre, and others not being passed upon by the Court, we reply as follows:

These oppositions were interposed in the proceedings in the first drainage district, and will be found at pages 321,

414, 415, and 417 of the record, and of them the Court said, after considering some other oppositions:

"There are other grounds of opposition in the record, but they have not been urged before us, and *we find nothing in them demanding attention;*" and then overruled all oppositions and adjudged "that the approval and homologation operate as a judgment against the property described as assessed in said roll, and also against the owner or owners thereof, with ten per cent. in addition to said amount to pay costs and counsel fees."

It is quite apparent that all oppositions in the case were disposed of by the decision of the Court, as above quoted.

Respectfully submitted,

GROVER CLEVELAND.
THOMAS J. SEMMES.
RICHARD DE GRAY.

No. 852 AND THREE OTHER CASES.

# Supreme Court

OF THE UNITED STATES.

*OCTOBER TERM* 1890.

JAMES WALLACE PEAKE ET ALS., Appellants,

*versus*

THE CITY OF NEW ORLEANS, Appellee.

PETITION FOR REHEARING.

RICHARD DEGRAY,
THOMAS J. SEMMES,

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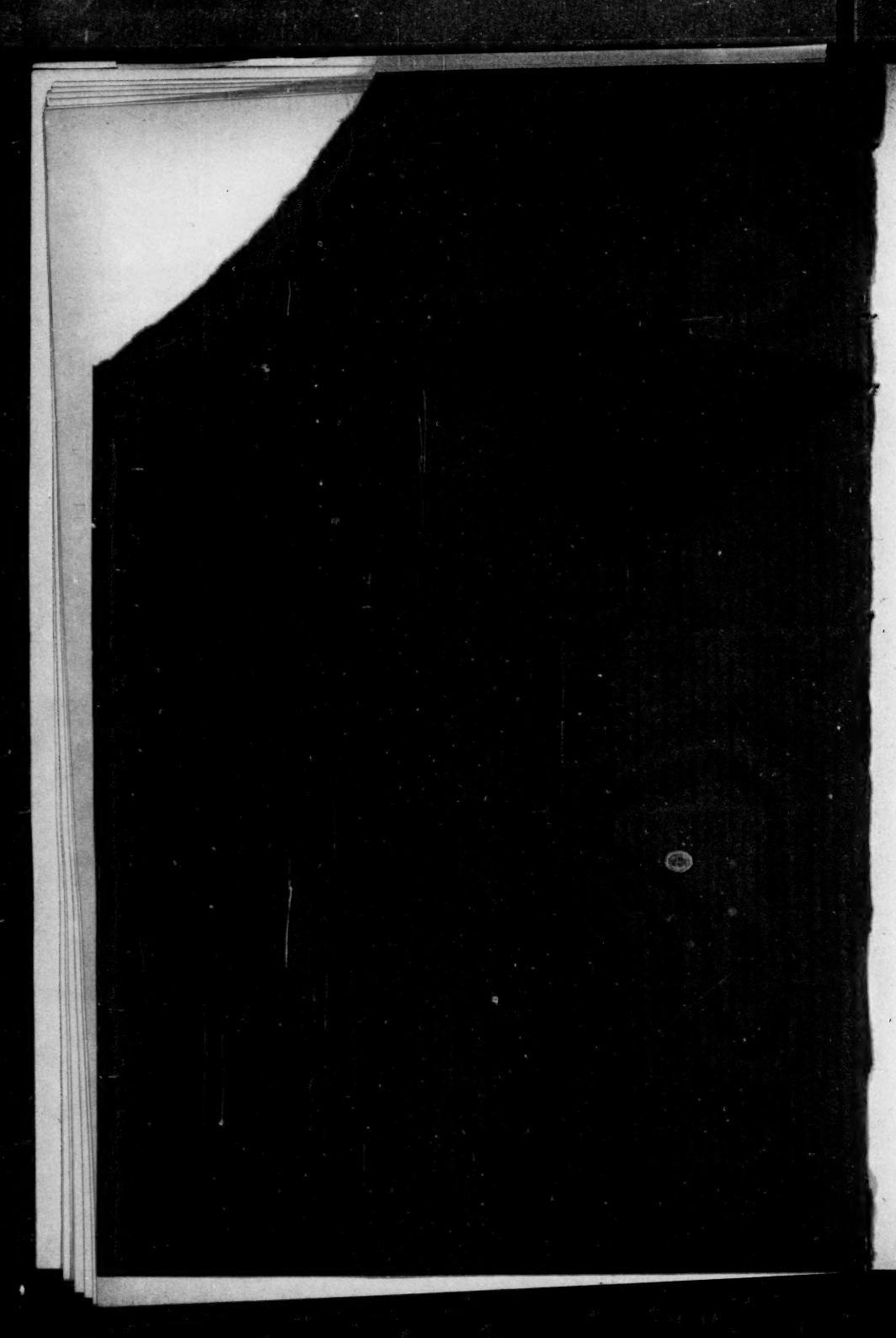

No. 852 AND THREE OTHER CASES.

# Supreme Court

OF THE UNITED STATES.

*OCTOBER TERM* 1890.

JAMES WALLACE PEAKE ET ALS., Appellants,

*versus*

THE CITY OF NEW ORLEANS, Appellee.

PETITION FOR REHEARING.

*To the Honorable the Supreme Court of the United States:*

The appellants in the above entitled and numbered cases humbly pray, that the Court will rehear and reconsider the matters decided by judgment rendered on the 9th day of March, 1891, so far as the same involve the following questions:

*First.* The matter of set off, by which the judgments against the City of Orleans, based on assessments levied on its streets and squares, have been declared extinguished by the issue and delivery of bonds of the "Drainage Series," to pay drainage warrants delivered to the contractor Van Norden for canals dug and levees built.

*Second.* In so far as said judgment ignores the amount of $4,448 77, drainage taxes, collected by the City of New Orleans from individual drainage tax payers, and now standing to the credit of the drainage fund, on the books of the City of New Orleans, and against which no right of set off is claimed by the city.

*Third.* In so far as said judgment involves the question of non-liability of the City of New Orleans for the abandonment of any and all matters of drainage, after its purchase of the plant and franchise of the canal company and Van Norden, in June, 1876, at a price fixed by its own appraiser, by the issue and delivery therefor of $320,000, of drainage warrants, payable solely out of drainage taxes.

The grounds of this application are:

I.

That the Court seems to have overlooked the provision of the act of the Legislature, approved April 26, 1872, being No. 73 of the acts of that year, under and by virtue of which said bonds, which are claimed as a set off, were issued, and especially the latter clause of the thirteenth section of said act, wherein it is declared that:

"All taxes collected for drainage, and not required for the "payment of drainage warrants, shall be devoted to the pur- "chase from the lowest bidder of bonds issued for drainage."

II.

That the Court failed to give to the appellants $4,448 77, now standing on the books of the City of New Orleans to the credit of the drainage fund, and against which the City of New Orleans claims no right of set off. The collection of this amount of drainage taxes, and the fact that the same has never been paid out for drainage warrants, or for any other purpose, have never been denied.

III.

That the Court erred in deciding that the holders of drainage warrants were third parties, as to the drainage fund, and were merely creditors of Van Norden, the assignee of the canal company, and as such had no right to complain of the abandonment of the drainage work; and that no matter to what extent the city might have destroyed the system and rendered uncollectible the taxes, against which she had drawn and for which she put on the market her drainage warrants especially the $320,000 thereof given for the purchase of the franchise and plant of the canal company, the holders of said warrants had no right to complain,

even though the city retained the property, and destroyed and rendered forever uncollectible the obligations she had given for the price

For these reasons which are elaborated in the briefs filed with this petition, and to the end that equity may be done and that the Court may upon fuller consideration and with the advantage of oral argument revise its opinion (if such revision be right and proper), your petitioners pray that the Court may be pleased to take these suggestions under careful consideration and grant a rehearing upon the points above indicated, and grant such other relief and order as in equity and good conscience may be proper.

RICHARD DEGRAY,
THOMAS J. SEMMES.

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We certify that in our opinion the foregoing application for a rehearing is well founded in law.

RICHARD DEGRAY,
THOMAS J. SEMMES,

No. 852 AND THREE OTHER CASES.

# Supreme Court

OF THE UNITED STATES.

*OCTOBER TERM* 1890.

JAMES WALLACE PEAKE ET ALS., Appellants,

*versus*

THE CITY OF NEW ORLEANS, Appellee.

BRIEF ON PETITION FOR REHEARING.

RICHARD DEGRAY,
THOMAS J. SEMMES,
Counsel for Appellants.

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No. 852 AND THREE OTHER CASES.

# Supreme Court

OF THE UNITED STATES.

*OCTOBER TERM* 1890.

JAMES WALLACE PEAKE ET ALS., Appellants,

*versus*

THE CITY OF NEW ORLEANS, Appellee.

## BRIEF ON PETITION FOR REHEARING.

I.

The contention of the defendants as to the finality and legality of the judgments against the City of New Orleans, based on assessments levied on its streets and squares, is conceded; the debt represented by those judgments amounts to $700,000. The Court says that "on the face of the record there is no discharge "of the city's obligation as assessee; and if we rest on the "on the letter, it perhaps could not be denied that the city is "still a debtor to that fund."

The Court then applies the doctrine of set-off, as follows:

"But equity looks beyond the form to the substance of "things."

And after reviewing the history of drainage and the issue of bonds of the "drainage series" to take up drainage warrants, says:

"If the city, as assessee, owed the drainage fund seven hun- "hundred thousand dollars, it may rightfully answer to any "demand of the contractor or its assignees, that it pay that

"amount into the fund, 'I have already paid it,' and it is no "reply to that answer to say, 'when you paid it you did not "declare that you paid it in discharge of that indebtedness." "It is enough that the city paid it without other consideration "than the discharge of its indebtedness."

But did she pay it without other consideration than the discharge of her indebtedness?

The issue and delivery of the drainage bonds, from which this payment is claimed to arise, was under a positive command of the Legislature. The 13th section of the act No. 73 of 1872, which, as far as relates to the matter in hand, reads as follows:

*Be it further enacted that* * * * * for excavations and levees, drainage machinery, and revetments, authorized by law or required for the protection of the city from overflow or inundation, the city may issue from time to time, as they may be required, bonds of the denomination of five hundred and one thousand dollars, having fifty years to run, and bearing seven per cent interest, principal and interest payable in gold, in New York or New Orleans, and at any other point the Council may dsignate; with quarterly coupons, and that the bonds thus issued shall be called the New Consolidated Debt of New Orleans No bond shall be issued but by authority of the Council; nor for a lower rate than ninety cents on the dollar; all issued for excavations and levees, authorized by Act No. 30 of 1871, or by drainage laws previously enacted, shall be marked "Drainage Series;" and all taxes collected for drainage, and not required for the payment of warrants, shall be devoted to the purchase from the lowest bidder of bonds issued for drainage. No bid shall be accepted above par, and the right is reserved to the Council to reject all bids."

Passing over the positive provision of this law that the bonds were to be issued for excavations, levees, drainage machinery and revetments authorized by law or required for the protection of the city from overflow, and passing over the further fact that many of the bonds that were issued, and which the Court allows as an offset, were delivered to pay for land taken for the places on which the canals were excavated and the levees built, as well as to pay for wooden revetments, none of which obligations

were to be paid out of drainage taxes, we submit that the set off adopted by the Court is positively prohibited by the latter part of the above section, which after providing for the issue of the bonds, the rate of interest they were to bear, the time for which they were to run, and their designation of "Drainage Series, declares "*all taxes collected for drainage and not required for the "payment of drainage warrants shall be devoted to the purchase "from the lowest bidder of bonds issued for drainage.*"

To this section the Court has not given an interpretation, nor has it explained the meaning of the language above quoted in connection with the issue and delivery of the drainage bonds, and it seems to us that in the multiplicity of the facts in the case the clause in the act of 1872 just referred to, must have escaped notice.

If these bonds are an advance to, or a payment into the drainage fund, and the city thereby became a creditor of the drainage fund to the amount of the funds issued, it cannot at the same time be denied that the holders of drainage warrants are also the creditors of that fund, for they hold obligations directly payable out of that fund, and the question then would be, who is entitled to priority of payment? and this is settled, we submit, by the law under which the bonds were issued. Or this section, we submit, may mean that the city, from the date of passage of the Act of 1872, became absolutely responsible for the debts created for drainage, which were to be discharged by the bonds, and thereafter she had a right to look to the drainage taxes for reimbursement, and that this was the law until the adoption of the constitutional amendment of 1874, which went into effect January 1, 1875. After the adoption of that amendment, prohibiting the further issue of bonds, the drainage taxes again became the fund from which the drainage work was to be paid. This view is strengthened by the language of the amendment itself, which declares, that it was not to be construed, * * * "so as to prevent the issue of drainage warrants to the transferee of the CONTRACT under Act No. 30 of 1871, payable only from drainage taxes, but not otherwise," etc.

Viewed in either aspect, it would seem that as long as there is a drainage warrant unpaid, all the drainage taxes whether due

by the city or by individuals, are *first* to be applied to the payment of said warrants (Statutes, pp. 22 and 23). It is only after all warrants are paid that the taxes can be applied to the redemption of the bonds.

This section, and especially the latter clause thereof, has a meaning and a bearing on this question of set off.

II.

As to the $4,448 77 of drainage taxes collected and now standing to the credit of the drainage fund.

As to this item we submit that the Court's decision is erroneous, because there are $4,448 77 of "taxes collected for drainage" and required to pay drainage warrants This sum was collected from individual drainage taxpayers and is now standing to the credit of the drainage fund, which we submit the Court in the multiplicity of the facts in this case must have overlooked.

The bill alleges (Record, pp. 10 and 11) as follows:

"*Fourth.* Seven thousand five hundred and two dollars and "fifty-seven cents collected by said city as attorneys' fees in the "third drainage district, which, it was decided in the case of "Lacy vs. The City of New Orleans (28 La. Ann. p. 158), be- "longed to said City of New Orleans as a part of the drainage "fund, and of which sum three thousand and fifty-three dollars "and eighty cents has been illegally and improperly paid out by "said city on the dates and to the parties specified in exhibit "hereto annexed and made part hereof, and marked 'account "No. 2,' leaving a balance ($4,448 77) due to the credit of said "account which should be paid to your orator and parties "similarly situated."

To this allegation of the bill there is no denial in the answer.

While the finding of the master is as follows: "13th. The "defendants have presented an account, showing they have "collected $9,825 20 in the third drainage district for attorneys "fees, against this amount defendants have charged $5,493 20, "as paid to several city attorneys for services rendered in the "third drainage district, leaving a balance of $4,392 00 remain- "ing in defendants' possession, according to their own admis- "sion, for which defendants must account." Rec. p. 88.

This amount, $9,885 20, is made up from a statement furnished by the city as follows:

| | |
|---|---|
| Attorneys' fees collected in third drainage district, from June, 1871, to July, 1876 | $6,620 35 |
| From July, 1876, to October 1888 | 3,264 85 |
| Record p. 435 | $9,885 20 |

To this finding of the master, there is no exception whatever as to the balance shown to be due, but only in so far as the expended amount is concerned. Rec. p. 100, 31st exception.

There is another statement (the copy of which is filed with the bill), from ledger C and D, covering a part of the collections for the above time, to wit: from September, 1875, to November, 1882, with the expenditures, showing this fund to stand as follows:

| | | |
|---|---|---|
| Collections | $7,502 57 | |
| Expenditures | 3,053 80 | $4,448 77 |

Record, pages 225 and 226

This latter statement was offered in evidence and marked by the examiner, O. B. S Ex, April 6, 1888. (See page 34—master's notes—and stipulation for the correction of and addition to record filed in U. S. Supreme Court, March 13, 1890, pages 2 and 11 thereof.) The correctness of this statement is proved by the evidence of E. Jannet, city book-keeper, pages 44 and 45, and that this amount belongs to the drainage fund, although collected as attorneys' fee, was directly decided in 28 La. Ann., p. 158.

This latter case is also useful, as showing that there is no difference between the Mayor and Board of Administrators of the City of New Orleans and the corporation itself; or in other words, that the terms Mayor and Board of Administrators, as used in Act 30 of 1871, mean the City of New Orleans as a corporation.

That the above matter should have escaped the Court's attention, is perhaps due to the fact that it was not referred to in our brief, and we now apologize for the omission, but small as the item is as compared with the other matters in the case, it is an item we submit which justly belongs to appellants, and is sufficient in any event to pay them a trifle and justify a modifica-

tion of the decree herein, and relieve said appellants of the costs of this case for an accounting (which amount to several thousand dollars), and especially as the city has never before in any manner made an account of her administration, but has often furnished statements from her records and left those records in a state, to show a large amount due by her to the drainage fund.

III.

We humbly submit that the drainage warrant holders are not the creditors of the Mississippi and Mexican Gulf Ship Canal Company, or Van Norden, its transferee, but they are creditors of the drainage fund. This was determined by the judgments at law, which are payable solely out of drainage taxes, and which are made the basis of the present proceedings. Rec p. 212 and 531. The holders of the drainage warrants may be assignees of the contractor, but they are not his creditors.

And we further submit that the present case is not one where the parties by mutual consent agree to quit work, but rather that of the proprietor buying out the plant and franchise of the contractor, to the end of continuing and completing the work himself; to the further end, that his obligations given for the purchase and dependent solely upon the completion of the work, may be paid.

In other words, the facts in this case are, that the city, at the time acting under legislative authority, not as trustee, but as principal, and vested with full power of choice and discretion, buys at an appraisement made by her chosen officer, gives her obligations—drainage warrants—payable out of drainage funds, in payment for the property delivered, and then destroys that drainage fund by refusing to complete this or any other system of drainage; and at the same time holds on to the property thus purchased and pays nothing. She purchases under an agreement to do, and pays the price in obligations, absolutely dependent upon her doing what she agreed to do, and then refuses to do what she agreed to do, and at the same time keeps the property purchased and pays nothing. This, we submit, is a great wrong, which neither in law, equity, or good morals, the

city should be allowed to inflict on those who paid value on the faith of her agreement to do.

If it be true that the city has extinguished her indebtedness to the drainage fund by the $1,587,764 12 (Rec. p. 430) of bonds issued prior to 1875, and if it be true that the city had, prior to her purchase in June, 1876, collected nearly all the drainage taxes from individuals which were collectible, then what an injustice was inflicted on the contractor and his assignees in issuing to him worthless paper for the price of his property? Is not the city, which, as a corporation purchased this property, bound in equity to pay the stipulated price, if the paper given for it was worthless?

That the plan for drainage was feasible and would have been efficient, is proved by a like system of drainage in use by every advanced and successful sugar planter in the State. Their system like this is to surround their plantation with a wide high levee, made from the excavation of canals immediately inside of that levee and then inside the surrounding canal and levee to dig intersecting canals, leading into the large outside canals, from which the water is pumped over said surrounding levee, and the interior is thereby relieved and kept free from water. The success of such a system is now a matter of history. The plan for the drainage of the city was more extensive but it was equally practicable.

And lastly, we submit there is error in the conclusion of the Court to the effect that if the drainage work had been completed the property would still have remained in its valueless condition of swamp and overflowed land. We think a careful examination of the evidence of W. H. Bell, p, 269; L. J. Fremaux, p. 499 and 506; Guthrie, 649; E. C. Palmer, pp. 507 to 517; giving the judgment of no less an expert than the late Jas. B. Eads, will establish the contrary.

But, after all, the city was not bound to this system, but was after the purchase under section 4 of the Act 16 of 1876 (Statutes p. 16), given entire control over all matters of drainage, and could make such modifications of the system, or adopt such other system as she saw fit, to the end that land be drained and made valuable to pay the drainage taxes, as they would have been had they been drained (Guthrie p. 671; Chadwick p. 498),

and to do all of which she was possessed of an unused power of taxation that was more than sufficient. Pp. 86 and 87.

Respectfully submitted,

RICHARD DEGRAY,
THOMAS J. SEMMES,
Counsel for Appellants.

Supreme Court U. S.
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IN THE

# Supreme Court of the United States.

*No. 1234.*

JAMES WALLACE PEAKE, MARY J. MITCHELL, EXECUTRIX OF RICHARD D. MITCHELL, AND JAMES JACKSON, APPELLANTS,

*vs.*

THE CITY OF NEW ORLEANS, APPELLEE.

*No. 780.*

JAMES WALLACE PEAKE, PLAINTIFF IN ERROR,

*vs.*

THE CITY OF NEW ORLEANS, DEFENDANT IN ERROR.

## SUPPLEMENTAL BRIEF IN BEHALF OF THE CITY OF NEW ORLEANS.

CARLETON HUNT,
*City Attorney of New Orleans.*

and to do all of which she was possessed of an unused power of taxation that was more than sufficient. Pp. 86 and 87.

Respectfully submitted,

RICHARD DEGRAY,
THOMAS J. SEMMES,
Counsel for Appellants.

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JAMES WALLACE PEAKE, MARY J. MITCHELL, EXECUTRIX OF RICHARD D. MITCHELL, AND JAMES JACKSON, APPELLANTS,

*vs.*

THE CITY OF NEW ORLEANS, APPELLEE.

*No. 780.*

JAMES WALLACE PEAKE, PLAINTIFF IN ERROR,

*vs.*

THE CITY OF NEW ORLEANS, DEFENDANT IN ERROR.

**SUPPLEMENTAL BRIEF IN BEHALF OF THE CITY OF NEW ORLEANS.**

CARLETON HUNT,
*City Attorney of New Orleans.*

# In the Supreme Court of the United States.

No. 1,234.

JAMES WALLACE PEAKE, MARY J. MITCHELL, EXECUTRIX OF RICHARD D. MITCHELL, AND JAMES JACKSON, APPELLANTS,

*vs.*

THE CITY OF NEW ORLEANS, APPELLEE.

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No. 780.

JAMES WALLACE PEAKE, PLAINTIFF IN ERROR,

*vs.*

THE CITY OF NEW ORLEANS, DEFENDANT IN ERROR.

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*Supplemental Brief in Behalf of the City of New Orleans.*

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## STATEMENT OF FACTS AND OF THE PLEADINGS.

The statement of facts and of the pleadings made in the brief, originally filed herein for the City of New Orleans, is now adopted and made part of the present supplemental brief.

## ARGUMENT.

Act 30 of 1871 has occupied no small part of the discussion of heretofore. In the time when Act 30 was taken up for consideration, and action had by the then city government of New Orleans, it was made the subject of a special report by the Administrator of Public Accounts to the City Council. According to that report, the effect of Act 30 was to give a new phase to the drainage question. It

abolished the Board of Drainage Commissioners which, in point of fact, had had a disputed existence only, since the Ship Island Act of 1869.

It had been contended, in behalf of the Act in question, not only that it was in fulfilment of the original design for draining New Orleans, but actually an improvement upon it. On the other hand, Act 30 was warmly opposed and disputed, and objection raised thereto, especially on the ground, that the Legislature had erred and exceeded its power in fixing the price of excavations and embankments, each, at 50 cents per cubic yard. Transcript of Record, 468.

The evidence heard and considered in the Circuit Court below, leaves no doubt whatever, that the price here named is an oppressive and tyrannical exaction.

The City Surveyor, B. M. Harrod, an engineer of much experience, who is shown to have served on the Mississippi River Commission from the date of its formation, was called and heard as a witness in this connection.

His testimony proceeds as follows:

"Q. Don't you know as a matter of fact that it was seriously complained of, that the rate charged by the Mexican Gulf and Ship Canal Company was too high, and the object of the City of New Orleans was to buy out the company to get the rates cheaper?

"A. Yes, sir; I think I know of that fact. *The rates were regarded as excessive.*

"Q. What has been your experience in reference to digging canals with machinery and building levees; what is a fair price?

"A. I should estimate work of that sort *at 25 cents a yard.*

"Q. And in that estimate you would of course expect to be paid in cash, and not in promises?

"A. In cash, of course. I think that would be the amount for an engineer to make a safe and full estimate.

To cover the work to be done I would put it at 25 cents, *and I should expect to get it done at less.*

"Q. That would be the ordinary basis upon which a contractor would proceed, about 25 cents a yard cash?

"A. Yes, sir; and under that estimate *I should expect to be perfectly safe and have the work done for less.* Transcript Record, p. 701-702.

Further on, the examination of this witness is continued to the same effect:

"Q. At the time the work was said to have been done, what would be the actual cost, or the true and safe calculation, for building that revetment levee, in the manner indicated upon Bell's plan?

"A. I think the excavating of that work *could be done for 25 cents* a yard, and the grading and surfacing could be done *for 10 cents*, instead of $1.

Turning to the Report of City Surveyor Bell, which was made to show the amount of expenditure required under Act 30 of 1871, it will be found, that the estimate of this officer *was actually based on 50 cents*, as the cost per cubic yard for excavating: and that although a considerable reduction of area might have been had by adopting the Metairie Ridge as the rear limit of drainage, the report of Mr. Bell was avowedly submitted with a view to drain, at the extravagant rate indicated, the entire alluvial plain on which New Orleans is situated, consisting, as it does, of 26,026 acres. (R. p. 339.)

The same Report, likewise, shows, what the experience of Mr. Bell himself had actually been, in excavating prairie lands. The report proceeds as follows: "Canals of thirty "feet width, ten feet deep, can be excavated with dredges "*for 25 cents per cubic yard.* In swamp timber land the "cost has been *35 cents to 38 cents per cubic yard* for "canals thirty-five feet wide, eight to ten feet deep."

Recurring now to the testimony of the first witness

cited, Mr. Harrod, it will be found by the court that there is no room left for doubt concerning the facts.

An attempt was made by the complainants, however, a feeble attempt, it is submitted, to show in the proceedings below, the charge against the City of 50 cents per cubic yard for excavations and 50 cents for levees to have been a fair charge, notwithstanding the testimony here quoted.

But the result of complainant's endeavors, evidently, was the confusion of their own demand. On cross examination this was clearly exhibited. The complainants struggled in full view of all to get out of the situation to which the testimony had reduced them, but failed conspicuously.

Said their counsel, questioning Mr. Harrod:

"Q. Did they pay 50 cents per cubic yard *for all* the canals and excavations that were made?

"A. Well, I think I saw *some* memoranda at 37½ cents." (R., p. 703.)

And again complaintant's counsel asked:

"Q. Look over this statement, which purports to be a statement of the City Surveyor's office, and say whether or not *some of* the work was paid for by far *less than 50 cents* on the dollar; for instance, look *at this name?*

"A. Yes, sir; that is less than 50 cents.

"Q. How much less?

"A. I noticed, as I said before, I believe, that in some cases I observed payment of 37½ cents."

The fact of the ruling charge against the city, for work, at the rate of fifty cents per cubic yard for excavations and fifty cents per cubic yard for the protection levees, being thus evidently left undisturbed, recourse was had by the complainants to another witness, E. C. Palmer. There is no room at all for doubt, that the interest of Mr. Palmer is identified with that of the complainants. He says himself that he loaned a large amount of money to the Canal Company, on the securities of the city, and *as he chose*

*to insinuate, for the payment of work done, in accordance with the contracts*, and he goes on to add, in so many words, that he, the witness, was *very largely interested*. Now Act 30 of 1871 had especially enjoined, upon the Board of Administrators of New Orleans, collection of the assessments therein authorized, in *time to provide for the payment of the warrants to be issued to the said company, at the date of their issue*. Section 9 of the Act, therefore, really did make provision for warrants *to be payable in cash;* and it was for these warrants, according to the terms of Section 8, that the Mississippi and Mexican Gulf Ship Canal Company, and their co-adventurers, including Mr. Palmer, were empowered to draw on the Administrator of Finance, in payment of the work to be done, at the rate of fifty cents per cubic yard for excavations, and fifty cents for embankments. Assuming, then, the cost of excavations to be 25 cents only, inasmuch as the protection levee required for drainage canals must be constructed out of the earth as thrown up in digging, it results very clearly, that it was actually the exorbitant design of the Legislature in Act 30 of 1871, *to extort from the City of New Orleans four times the correct price, for the vast work which the Act abandoned to the Mississippi and Mexican Gulf Ship Canal Company*.

It has been intimated, that recourse was had by complainants to the testimony of Mr. Palmer, in order to argue that the drainage scheme in question, instead of proving profitable, fell short of realizing expectations, and so imposed loss upon the Canal Company. The record is appealed to, to sustain this view of the City. Called upon to show the embarrassments into which the Mississippi and Mexican Gulf Ship Canal Company fell, Mr. Palmer attempted to prove a decline in the warrants issued to them.

He says: "When they were first issued, he (Van

Norden, transferee of the company) got as much as 75 cents on the dollar, and when capitalists lost faith in the City that she would do right, they fell down to so low before he sold out to the City, that he could not get more than 33 or 40 cents on the dollar for them. They were as low as 33⅓ cents." R. p. 515.

Assuming the facts to be here correctly stated, that consideration, evidently will not acquit the statute of the covetous design to despoil fourfold, and of consequent illegality and oppression. Nor would the City, in the case so supposed, be righted and relieved, but on the contrary, its condition still remain a deplorable one.

If then the facts are taken to be correctly stated by Mr. Palmer, what then? It is easy to see. Instead of having been paid four times the value of the work performed, the company must have received for a period, at any rate, nearly three times as much as they were entitled to have, and were later on reduced to the rate of 33 cents per cubic yard. Granting then, that the drainage work was temporarily so paid for, and for digging, when joined with levee building, (inasmuch as combined labor of this kind at the time in question, as proved by Mr. Harrod, was really worth 35 cents per cubic yard), it might be curious to inquire exactly what loss in the circumstances, the Canal Company could possibly have suffered. It is clear, however, that such an examination is not at all exacted by the nature of the argument. Debate concerns itself properly, just here only, with the question, whether or not the Legislature exceeded its power in the enactment of Act 31 of 1872, in requiring $1 per cubic yard for work worth at the outside 35 cents, and not at all with the profits and losses which may have happened, in carrying out such an Act.

The assessments provided for by Act 30 of 1871 were most unsatisfactory, if not arbitrary, in assessing by the superficial foot, irrespective of valuation. They were im-

practicable in actually levying taxes on territory beyond the entire value of the land itself. Again, unless the land in question brought the price of the assessment, it could not be sold. Finally, depreciation in the drainage warrants provided for, was made inevitable. The plan of Bell was for seventeen miles of drainage work only, while stimulated, no doubt, by the impositions of which the City was to be made the victim, the amount of dredging attempted was nearly double the amount originally estimated for, or thirty miles. (R. p. 517.)

The court below, both Judges concurring, pronounced upon this state of affairs as follows: "A final embarrassment which any trustee would have found difficult to overcome, should be mentioned, viz: "That by the Act No. "30 of 1871, the Legislature selected a contractor and "fixed the rate per cubic foot *to be paid for excavations* "*at within fifteen cents of three times the original estimate* "*for the work, and though the system was less than two-* "*thirds completed, the amount of excavation in cubic feet,* "*as determined by the proper authority, selected by the* "*Legislature, was double that upon which the assessments* "*were calculated.* R. p. 786.

"It may be added that the City was entirely without "means to prosecute the work to completion. She was "prohibited by the Constitution from in any manner or "form increasing her debt. The drainage funds were, "as shown herein, inadequate and uncollectible, and al-"ready burdened with a debt of over $600,000 on account "of drainage warrants outstanding. In short, the system "of drainage has remained incomplete and has failed, be-"cause it was an unwise and inadequate system, where "every motive springing from human cupidity was against "its success, and where provision originally inadequate "was consumed by extortionate prices established by the "Legislature itself." R. p. 786.

Reference to the report of the Administrator of Accounts

of the City of New Orleans, on the occasion of the enactment of Act 30 of 1871, has already been made. That officer indicated the pressing necessities to which the City had been reduced. The provisions of Act 30 were peremptory. The City had no chance, but to go on or risk a dangerous law suit. The act virtually said: "*Lay down lines, and fix the location for drainage work, or the City will have to pay damages.*" It is clear, so the Administrator insisted, that this might have resulted in the *work being paid for by the City, without its being done at all.* Accordingly, the letter of the law was obeyed by the municipality, but with careful reservation of its rights. R. p. 468.

It remains now to establish that the Legislature erred altogether in the premises, and exceeded its power, in enacting Article 30. Application of well established principles and of familiar authorities, to the facts of the case, will, it is believed, establish this to the satisfaction of the Court.

In its largest sense, the term Constitution signifies the aggregate of those fundamental laws, institutions and usages, which make up the polity of the State. It follows, necessarily, that a great portion of a Constitution must be unwritten. The Constitution of the United States and the Constitution of the State of Louisiana, form but a part, and a small part, of the fundamental law, under which the people of Louisiana live. The Constitutions referred to, are not original and fresh enactments, but are the growth of time, and of our American civilization. Many of the provisions contained in them are the original inheritance of the American people, which have always been enforced among them, and which, it is believed, would have continued in force, even if what are now called National and State Constitutions had never been adopted. It is not necessary to enumerate. The trial by jury, the leading forms of representative government,

the law of evidence, the definition of treason, and of other crimes, the distribution of local government between countries and towns, may, however, be cited. These and many other guarantees, have been a part of American liberty from the earliest time. Some have been specially re-enacted, but the re-enactment was a mere form; an act of supererogation. They would have continued in full force and effect without it. Thus the Constitution of the United States provides equally with the Constitution of Louisiana of 1868, that private property shall not be taken for public use without just compensation. But the principle so consecrated in the two Constitutions, is one of perpetual obligation, and is operative independent of the instruments themselves. (*Bowen's Documents of the Constitution. No. 84 of the Federalist, by Hamilton*).

It was in pursuance of these and of similar views, that in 1792 the Supreme Court of South Carolina, Bay, R. 252, in the case of *Bowman vs. Middleton*, set aside an act of the colonial Legislature, as being against common right, and the principles of *magna charta, for it took away the freehold of one man and vested it in another, without any compensation*, or without any previous attempt to determine the right. The court proceeded to declare the act to be, *ipso facto*, void, and that no length of time could give it validity.

*Chancellor Kent, in his Commentaries*, Volume 1, p. 452, 13th Edition of Holmes, holds, that this was not strictly a question arising upon any special provision of the State Constitution; but that the Court proceeded upon those great fundamental principles which support all government and property, and which have been supposed by many judges in England, to be sufficient to check and control the regulations of an Act of Parliament.

It is submitted, not without confidence, to the Court, in view of what has been said, that the Legislature of the

State of Louisiana, could not impose upon the corporation of the City of New Orleans, and upon the citizens thereof, a public work, and force them by statutory provision to pay three or four times the just value thereof. The Legislature could not do this, without extorting from the assessees the excess of the true price. That excess it is clear being taken without consideration, although raised under the forms of law, must be wrongfully and despotically taken. It is as much against Common Right and the Law of the Land, to take away a man's money and give it to another, as it is to take away the freehold of one person and vest it in a different person. ✱

It is in view of like considerations with those which the City of New Orleans invokes, that it is observed in the work of *Cooley on Taxation*, as follows: "Vast (says this "writer) as is the power of the government to levy taxes "upon its citizens, there are nevertheless limitations upon "it of a very distinct and positive character, which inhere "in the very nature of the power itself. *Some of these "limitations are commonly declared in the written con- "stitutions, but the declaration is rather from abundant "caution than from any necessity, as the limitations are "equally imperative whether thus declared or not.*" Cooley on Taxation, p. 41.

And further on in his Work on Taxation, the same learned author says: "A clear case of abuse of legislative author- "ity, in imposing the burden of a public improvement on "persons or property not specially benefited, *would un- "doubtedly be treated as an excess of power and void.*" Cooley on Taxation, p. 428.

*In Hammett vs. The City of Philadelphia*, 65 Pennsylvania State Reports, p. 153, the subject in question received elaborate consideration by the Supreme Court of Pennsylvania. In that case, the Court found, that while there was no clause in the Constitution of Pennsylvania, which restricts the power of taxation in the Legislature,

yet there are necessary limits to it, in the very nature of the subject. It was very clear, according to the Court, that the taxing power can not be used in violation of provisions in the bill of rights.

Justice Sharswood, speaking for the court, in the case cited proceeded to

*This is the identical view pressed by respondent and passed upon by the court in *Tide-water Company* vs. *Coster*, 18 New Jersey Equity Reports. Giving the opinion in that leading case, Chief Justice Beasley says: "One of the prin- "cipal reasons urged why this act could not be enforced, "was that it authorized the commissioners to pay to the "company more than the expense of constructing the works "and performing the labor incident to the enterprise. It "was insisted, that beyond such actual cost and expenses, "these officers, by force of this statute, could agree to pay "to the corporation such sum as they saw fit; and that, as "to such excess, the property of the land owner was taken "from him without compensation. *If this, in point of fact,* "*be so, the conclusion of the counsel of the respondents would be* "*indisputably logical; the act would be plainly unconstitutional.*" p. 518, 524.

"government, as well as all others, is intended in the first "section of the ninth article: 'All men have certain in- "herent and indefeasible rights, among which are those "of enjoying and defending life and liberty, of acquir- "ing, possessing and protecting property and reputation, "and of pursuing their own happiness.'

"The dollar which a poor man has earned by the sweat "of his brow, the fortune which a rich man has inherited "from his ancestors, stand on the same rock, and are sur-

" rounded and protected by the same barrier. Invested " for comfort and assurance against want in sickness or " old age, or cherished as a provision for widow or orphan " after he has gone, it is a right which it is a depotism to " take from him, except for the necessary purposes of " government, by equal and just taxation. It is none the " less so, if it be the act of the hydra-headed monster, a " numerical majority, or that of a single autocrat. It is " the solemn duty of the judiciary, under our constitution, " to guard and protect this right of property, as well " from indirect attacks under any spurious pretext as " from open and palpable invasion. ' There being,' says " Chief Justice Marshall, of Kentucky, ' no express con- " stitutional declaration or prohibition directly applicable " to the powers or subject of taxation, and none which, " in terms, secure equality or uniformity in the distribu- " tion of public burthens, either general or local, there is " no clause to which the citizens can with certainty appeal " for protection against an oppressive and ruinous dis- " crimination, under color of the taxing power, unless it " be that which prohibits the taking of private property " for public use without compensation. This is the " conservative principle of the Constitution by which the " rights of private property are to be preserved from viola- " tion under public authority; and we should feel bound to " give it, as has heretofore been done, a liberal construc- " tion for the attainment of so important and valuable an " object. *Cheany vs. Houser*, 9 B. Monroe 341.' "

In the matter of *Washington Avenue, 69 Penn. State Reports, p. 357*, the Supreme Court of Pennsylvania returned to the doctrine of *Hammett vs. City of Philadelphia* with approval. In the matter cited, Justice Agnew was the organ of the court.

That judge says: "There is no case in our books, " wherein the legislative power to tax has been maintained " with greater vigor and ability than *Sharpless vs. City*

" *of Philadelphia*, 9 Harris, yet even there, the then " Chief Justice admits (p. 166) that the exercise of the " power may be forbidden by clear implication, as well as " express restriction. 'It is not every act the Legislature ' may choose to call a tax law, that is constitutional.' The " whole public burden, he contends, 'can not be thrown " upon a single individual, under pretence of taxing him.' " This is a concession that taxation has a limit *per se*, " and is not always coextensive with legislative exaction. " When, therefore, the Constitution declares in the ninth " article, that among the inherent and indefeasible rights " of men is that of acquiring, possessing and protecting " property—that the people shall be secure in their pos- " sessions, from unreasonable seizures — that no one " can be deprived of his property unless by the judgment " of his peers, or the law of the land—that no man's " property shall be taken or applied to public use without " just compensation being made—that every man for an " injury to his lands or goods shall have remedy by due " course of law, and right and justice administered with- " out sale, denial or delay, and that no law impairing " contracts shall be made—and when the people, to " guard against transgressions of the high powers dele- " gated by them, declared that these rights are excepted " out of the general powers of government and shall for- " ever remain inviolate, they, for their own safety, stamped " upon the right of private property, an inviolability " which can not be frittered away by verbal criticism on " each separate clause, nor the united fagot broken, stick " by stick, until all its strength is gone."

*In the matter of Canal street*, 11*th Wendells' Reports*, p. 155, in the Supreme Court of Judicature and for the Correction of Errors of New York, where the opinion was by Chief Justice Savage, the court say: " When the " corporation have determined the matter that the open- " ing of a new street would benefit the city, still, if the

" injury to individuals would exceed the benefit to the " public, it is improper to proceed. The principle that " private property shall not be taken for public use with- " out just compensation is found in the Constitution and " laws of this State, and has its foundation in those " elementary principles of equity and justice, which lie at " the root of the social compact."

The doctrine of the decisions cited, is the same general doctrine with that of the memorable drainage case, 11 La. Annual Reports, p. 373, where the opinion was given by the Chief Justice of the Supreme Court of Louisiana, and the same with that in *Municipality No. 2 vs. White, 9 La. Annual Reports, p. 448*, Justice Ogden speaking in behalf of the same Court, and treating the right of eminent domain and the powers of taxation as being limited under the Constitution of Louisiana.

Says Justice Ogden: " The principles of the Consti- " tion invoked by the appellants are of the highest im- " portance, and were designed to render the rights of " private property sacred and inviolable, and they do, " from their nature, afford the most ample constitutional " guaranty against any abuse of the legislative power. " We can not doubt that however subdivided the State " may be into cities, towns and parishes, those funda- " mental principles incorporated into the Constitution " must pervade the whole system of the body politic and " regulate and control all local legislation. There would " be but little guaranty for the rights of property, if the " dominion of the principles of the Constitution was not " over all the subdivisions of legislative power through- " out the State."

*In the matter of the Commissioners of the First Drainago District, 27 La. Annual Reports, p. 23*, where the the judgment of the lower Court homologating the assessment rolls of the First Drainage District was affirmed, Justice Howell, who gave the opinion of the Supreme

Court, recognized distinctly the limitation upon the legislative power of taxation here contended for by the city.

Said Justice Howell: "The State in ordering the draining "is exercising sovereign power, and can, of course, direct or "authorize the work to be done in such a way and compen- "sation made on such terms as in its discretion may seem "best, *restrained only by the fundamental principles upon which "the government is to be conducted.*"

The result to be derived from the principles and from the authorities which have been referred to, is well stated in the energetic but just language of the Supreme Court of the State of Vermont. 44 Vt. R. 174.

In *Allen vs. Drew* that court says, through Judge Redfield: "We had no doubt that a local assessment may so transcend "the limits of equality and reason that its exaction would "cease to be a tax or contribution to a common burden, and "become extortion and confiscation. *In that case it would be "the duty of the court to protect the citizens from robbery under "color of a better name.*"

In *Loan Association* vs. *Topeka*, 20 Wallace Reports, p. 663, Justice Miller, as the organ of this Court, says to the same effect: "There are limitations on such power which "grow out of the essential nature of all free governments; "implied reservations of individual rights, without which "the social compact could not exist, and which are respected "by all governments entitled to the name. No court, for "instance, would hesitate to declare void a statute which "enacted that A. and B., who were husband and wife to each "other, should be so no longer, but that A. should thereafter "be the husband of C., and B. the wife of D.; or which should "enact that the homestead now owned by A. should no "longer be his, but should henceforth be the property of B.

"Of all the powers conferred upon government, that of "taxation is most liable to abuse. Given a purpose or object "for which taxation may be lawfully used, and the extent of "its exercise is in its very nature unlimited. It is true that

"express limitation on the amount of tax to be levied or the "things to be taxed may be imposed by constitution or "statute, but in most instances for which taxes are levied, as "the support of government, the prosecution of war, the "national defense, any limitation is unsafe. The entire re- "sources of the people should in some instances be at the "disposal of the Government.

"The power to tax is, therefore, the strongest, the most "pervading of all the powers of government, reaching di- "rectly or indirectly to all classes of the people. It was said "by Chief Justice Marshall, in the case of *McCulloch* vs. *The* "*State of Maryland*, that the power to tax is the power to de- "stroy. A striking instance of the truth of the proposition "is seen in the fact that the existing tax of ten per cent., im- "posed by the United States on the circulation of all other "banks than the national banks, drove out of existence every "State bank of circulation within a year or two after its pas- "sage. This power can as readily be employed against one "class of individuals and in favor of another, so as to ruin "the one class and give unlimited wealth and prosperity to "the other, if there is no implied limitation of the uses for "which the power may be exercised.

"To lay with one hand the power of the Government on "the property of the citizen, and with the other to bestow it "upon favored individuals to aid private enterprises and "build up private fortunes, is *none the less a robbery because* "*it is done under the forms of law and is called taxation. This* "*is not legislation. It is a decree under legislative forms.*"

In *People* vs. *Morris*, 13 *Wendell's Reports*, p. 329, speaking for the Supreme Court of Judicature and the Court for the Correction of Errors of the State of New York, Judge Nelson says: "We have no bill of rights, though many of "the principles usually found in such an instrument are in- "corporated in the provisions of the constitution. The enu- "meration was designedly omitted, because unnecessary, and "tended to weaken if not endanger those unnoticed. The

"limitation or qualification in this respect must depend upon "the enlightened wisdom and discretion of the Legislature "and the decisions of the judicial department. It is now con- "sidered an universal and fundamental proposition, in every "well regulated and properly administered government, "whether embodied in a constitutional form or not, that pri- "vate property CANNOT BE TAKEN FOR STRICTLY PRIVATE "PURPOSES AT ALL, NOR FOR PUBLIC WITHOUT A JUST COM- "PENSATION. * * * *

Cooley, the same learned writer, who has heretofore been cited, has also treated the subject-matter in the regard now under consideration. His comments thereon are, in conclusion, submitted for the consideration of the Court. He says (Cooley's Constitutional Limitations, p. 212): "The bills of "rights in the American constitutions forbid that parties shall "be deprived of property except by the law of the land; but "if the prohibition had been omitted, a legislative enactment "to pass one man's property over to another would neverthe- "less be void. If the act proceeded upon the assumption that "such other person was justly entitled to the estate, and "therefore it was transferred, it would be void, because judi- "cial in its nature; *and if it proceeded without reasons, it would "be equally void, as neither legislative nor judicial, but a mere "arbitrary fiat.*[1] There is no difficulty in saying that any "*such act, which, under pretense of exercising one power, is "ursurping another, is opposed to the constitution and void.* "It is assuming a power which the people, if they have not "granted it at all, have reserved to themselves. The maxims "of Magna Charta and the common law are the interpreters "of constitutional grants of power, and those acts which by "those maxims the several departments of government are "forbidden to do cannot be considered within any grant

[1] Wilkinson *vs.* Leland, 2 Pet., p. 657.
Terrett *vs.* Taylor, 9 Cranch, p. 43.
Ervine's Appeal, 16 Penn. St., p. 266.

"or apportionment of power which the people in gen-
"eral terms have made to those departments. The Par-
"liament of Great Britain, indeed, as possessing the sov-
"ereignty of the country, has the power to disregard
"fundamental principles and pass arbitrary and unjust enact-
"ments; but it cannot do this rightfully, and it has the power
"to do so simply because there is no written constitution from
"which its authority springs or on which it depends, and by
"which the courts can test the validity of its declared will.
"The rules which confine the discretion of Parliament within
"the ancient landmarks are rules for the construction of the
"powers of the American legislatures; and however proper
"and prudent it may be expressly to prohibit those things
"which are not understood to be within the proper attributes
"of legislative power, such prohibition can never be regarded
"as essential when the extent of the power apportioned to the
"legislative department is found upon examination not to be
"broad enough to cover the obnoxious authority. The ab-
"sence of such prohibition cannot by implication confer
"power."

It is left to observe that the Record shows an agreement that both parties may read from any Act of the Legislature of the State of Louisiana bearing upon this case without the same being formally offered in evidence *and with the same effect as if it had been offered in evidence* (*R., p.* 774.)

The case (Record, p. 27) having been originally referred to an Examiner to take evidence, there was subsequently rendered an order, both judges concurring, in the Circuit Court to the effect that, in consideration of the nature of the case and of the voluminousness of the testimony, there be a reference to the Master from the testimony already taken and from such other testimony as might be offered and as in his opinion it might be necessary to settle and report, including any and all items of indebtedness and of payment, and *further authorizing the master to state such mat-*

*ters as he might think necessary or as either party might require.* (*R., p.* 29.)

Under this order of the court, by reason of the request made upon the Master by the parties, that officer thereupon proceeded to report and declare all the issues of fact and of law presented by the pleadings and the evidence. (R., p 49.)

The Circuit Court, on rendering a final decree, considering that there were exceptions to the conclusions reached by the Master upon the law and the facts, and considering, further, that these involved answers fundamental to a decision of the cause upon its merits, proceeded to pronounce judgment upon the pleadings and the evidence.

Whereupon the master's report was amended so as to conform to the ruling of the Court, and the bill of the complainants dismissed with costs. (R., p. 787.)

In view of the argument heretofore filed, and of the present brief in support thereof, for the filing of which leave of Court is prayed, it is submitted, in conclusion, that the judgment at law in favor of the City of New Orleans, in the case of *James Wallace Peake, plaintiff in error, vs. The City of New Orleans, defendant in error, No.* 780, and whereby the exception of the City of no cause of action was duly maintained below, and also that in equity, in James Wallace Peake, Mary J. Mitchell, executrix of Richard D. Mitchell, and *James Jackson, appellants, vs. The City of New Orleans, appellee*, dismissing complainant's bill, were correctly rendered by the Circuit Court of the United States for the Eastern District of Louisiana, AND OUGHT TO BE AFFIRMED.

Respectfully submitted,

CARLETON HUNT,
*City Attorney of New Orleans.*

# In the Supreme Court of the United States.

No. 1,234.

JAMES WALLACE PEAKE, MARY J. MITCHELL, EXECUTRIX OF RICHARD D. MITCHELL, AND JAMES JACKSON, APPELLANTS,

*vs.*

THE CITY OF NEW ORLEANS, APPELLEE.

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No. 780.

JAMES WALLACE PEAKE, PLAINTIFF IN ERROR,

*vs.*

THE CITY OF NEW ORLEANS, DEFENDANT IN ERROR.

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*Brief in Behalf of the City of New Orleans.*

CARLETON HUNT,
*City Attorney of New Orleans.*

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NOTE.—The appendix to the present brief has been enlarged by adding to it, for the convenience of the Court, the decisions of the Supreme Court of Louisiana, *In the Succession of Irwin, In the matter of the Board of Administrators, praying, etc.*, in the case of *Davidson vs. the City of New Orleans*, and that in the case of *State ex rel. Canal Co. vs. City et al.*

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## STATEMENT OF FACTS AND OF THE PLEADINGS.

These cases involve a statement of State legislation and policy, of ordinances and of contracts, as well as of the facts which resulted in the pending litigation. Such a statement was found quite indispensable in the lower court by counsel, who appeared there, and is reproduced here with some amendment, and with additional remarks for the use of the Court.*

*The case of *James Wallace Peake et al., appellants, vs. The City of New Orleans, No. 1,234*, is taken up for convenience in discussion, because the record presents most satisfactorily the issues raised, as well as the whole subject matter of the other suits, between the same parties now before this tribunal, Nos. 329 and 781, being the other Drainage Cases. By stipulation between the parties, No. 1,234 is heard together with *James Wallace Peake, plaintiff in error, vs. The City of New Orleans, No. 780* of the docket. This latter case was argued and decided in the Circuit Court for the Fifth Judicial Circuit and Eastern District of Louisiana, New Orleans division, on an exception of no cause of action. The City of New Orleans pleaded that the plaintiff, on the face of the petition and annexes, was not entitled to the judgment prayed for by him. (R. p. 28.) The exception of the City was maintained. (R. p. 29.) For purposes of argument the two cases are alike. *Mutatis mutandis* the opinion to be given by the Supreme Court of the United States in the suit at law, 780, must be the same with that in the equity suit No. 1,234.

The Statutes of the State of Louisiana relating to the subject of drainage are, for the sake of convenience, considered as divided into three periods, that is to say, the statutes of the first period, being those of the time before the war; those of the second period, the statutes of 1869 and 1870; those of the third period, the Canal Company or Van Norden Statutes. Reference to the Drainage Acts of 1835 and 1839 is, however, omitted as being not required by the discussion.

## I.

### THE STATUTES OF THE FIRST PERIOD, OR THOSE BEFORE THE WAR.

1. *Act 165 of the Acts of the General Assembly of the State of Louisiana of 1858* (*Exhibit A*). The title of this Act is:

> "AN ACT *to provide for leveeing, draining, and reclaiming swamp lands in certain portions of the Parishes of Orleans and Jefferson.*"

The drainage legislation requiring examination began with this Act. Its provisions may be briefly stated as follows:

*a*. It *established* and defined the boundaries of the *First, Second, and Third Drainage Districts*. These districts lay partly in the Parish of Orleans and partly in the Parish of Jefferson.

*b*. It constituted and prescribed the powers and mode of action of the *Boards of Commissioners*, a distinct Board in each district, and each Board having full and exclusive control of all drainage works in its particular district. (Sections 2 to 6.)

*c*. It required each Board to have prepared a *Plan*, showing the district to be drained, the drainage works to be constructed, and their *estimated cost*, the subdivisions of the property, and the names of the proprietors. This plan was to be deposited in the Mortgage Office, and after four weeks' notice of such deposit, judgment was to be rendered by a designated court, decreeing all the property

in the district covered by the plan to be affected with a first privilege to secure such drainage assessment as might be levied on it. (Sec. 7.)

*d.* It authorized each Board to levy a *uniform assessment*, per square foot, on the land to be drained; such assessment not to exceed $350,000 in each district (Sec. 8.)

*e.* It provided that the assessment so levied should be *recoverable before any competent Court*, and that payment should be enforced *by sale of the land assessed.* (Sec. 9.)

2. *Act 191 of the Acts of the General Assembly of the State of Louisiana of 1859 (Exhibit B).* This Act is supplementary to the Act of 1858. It provides:

*a.* That the Boards of Commissioners should be authorized *to borrow $350,000 for each district*, and to issue *bonds* therefor. (Sec. 1.)

*b.* That it should be *the duty* of the Boards, on issuing bonds, to *make an assessment* in conformity with the Act of 1858. This assessment was to be collected *in ten annual installments.* (Sec. 2.)

The remaining sections of the Act prescribe how the assessment shall be collected and applied, etc.

3. *Act 57 of the Acts of the General Assembly of the State of Louisiana of 1861 (Exhibit C).* This Act is entitled:

> "AN ACT *to provide for the collection of the assessment for draining, under the acts of March 18, 1858, and the act supplementary thereto of March 17, 1859.*"

It provides that when assessments had been made under the Acts of 1858 and 1859, the board should then prepare *Tableaux of Assessment* in their respective districts. These tableaux were to show:

*a.* The *property* assessed.

*b.* The *amount* assessed thereon.

*c.* The *names* of the owners.

When the tableaux had been prepared they were to be deposited in designated Courts. Notice of such deposit

was to be given, and all persons interested were called on, by the notice, to show cause why the tableaux should not be approved and homologated. If no opposition was made within thirty days, then the tableaux were to be homologated, and should then be:

> "A judgment against the property assessed and the owners thereof, on which execution may issue, as on judgments rendered in the ordinary mode of proceedings."

The three foregoing Acts may be briefly summarized as follows:

The *Act of 1858* establishes three drainage districts, and constitutes three Boards, with power to control the drainage works therein, and to levy and collect a drainage assessment.

The *Act of 1859* empowers the Boards to borrow money and issue bonds, and requires that the assessment should be made whenever bonds were issued.

The *Act of 1861* provides a summary remedy to enforce the collection of the assessment made under the Acts of 1858 and 1859.

The points to be specially noted in relation to these Acts are:

1. The Boards to whom the draining was committed, were distinct and wholly disconnected from the City of New Orleans and the parish of Jefferson.

2. Neither the City of New Orleans nor the Parish of Jefferson, is in any of the acts expressly declared liable for any portion of the cost of the work.

3. The terms used evidently refer to private individuals as the sole contributaries of the assessments.

It follows, under these acts, as the City of New Orleans and the Parish of Jefferson were not *expressly* declared liable, and had nothing to do with the execution of the works, which were of a kind that are usually constructed at the sole expense of the individuals benefited, that the Legislature did not intend that the city and parish should be numbered among the contributaries.

This conclusion is strengthened by the following considerations, viz: 1. The provisions for enforcement of payment of the assessment by sale of the property assessed obviously refer only to individuals. 2. If it had been intended that the City and parish should be liable for the assessment, the acts would not only have expressly so stated, but would have contained provisions relative to the manner in which, and the time when, their obligations should be met. 3. The City and parish are treated as on the same footing, and it would have been unprecedented to charge a parish with any part of the cost of such work.

It should also be noted that the work proposed to be done was one for *local improvement*, and the charge upon the lands intended to be benefited was, therefore, not a tax proper, but simply an assessment for a local improvement, and subject to all the conditions and limitations of such assessments. Accordingly, the language of the statutes and the intention of the Legislature in regard to these assessments must always be construed with reference to the elementary and fixed rules of jurisprudence on the subject of local assessments. Now there is not at this time, and was not then, any rule of law on this subject more firmly established, perhaps, than that which restricts the charge for a local improvement to the property locally benefited, and refuses to permit it to be enforced as a general charge against the owner. The principle involved was so generally understood by the people, as well as by lawyers, and the reasons for it were so obvious and conclusive, that the Legislature of the State of Louisiana was naturally enough, not very careful that the terms used in reference to the liability for the assessment should be absolutely and technically correct. The limitations on the liability were bound up with the liability itself, and, no matter what terms happened to be used, they would necessarily be self suggesting. When, therefore, the Act of 1861 declared that the homologation of the tableaux should operate as a judgment against the

x in La. at least,

property assessed and the owners thereof, it was not intended that the judgment of homologation should have the force of a general personal judgment against the owners of property, but only that it should have the force and effect of a judgment against the owners, *restricted in execution to the particular property assessed.* Under the Constitution and settled jurisprudence of the State of Louisiana, this is all that it was competent for the Legislature to have in view. It is insisted, that under *the settled jurisprudence* of the State at that time, the Legislature could have intended only to declare a judgment liability restricted to the property assessed, for, in the famous Drainage Case in the 11th Annual Reports, p. 373, the Supreme Court of Louisiana had been called on to interpret and declare the effect of a drainage assessment similar to that imposed under the Acts of 1858 and 1859, and the Court said:

"We have not understood from counsel that there is any case in which property has not been so far benefited by the work done as to increase in value more than the cost of the work assessed. Were not this the case the property of each proprietor, to the extent of the difference between the increased value and the cost of the work assessed to him, would be taken for a purpose of public utility, without adequate compensation previously made, and consequently would be in violation of the provisions of Art. 105 of the Constitution." *

Another consideration is to be added, and seems to be equally conclusive. The Act of 1861 did not provide for the *imposing* of the drainage assessment, but only for *the collection* of that which was imposed under the Acts of 1858 and 1859. That is, its object was not to *create* a liability, but *to deal with and enforce one that already existed.* It took the assessment as imposed under the prior Acts, and gave an appropriate and summary remedy for its collection. But in the Acts of 1858 and 1859 the intention to restrict the assessment to the particular property assessed is manifest. Neither of these Acts, it is submitted, contains any expression which can be fairly con-

strued as supporting, even in appearance, the theory that the assessment was intended to be a general personal charge on the owner, beyond the value of the property assessed.

The contention that the Act of 1861 designed to make the drainage assessment a general personal charge against the owners, to be evidenced by a judgment executory on any property belonging to them, is sufficiently refuted by the observations here made. Such a design could not have existed unless the Legislature had to disregard a well known principle of constitutional law, to set aside the jurisprudence of the State, and to add to the *effect* of a local assessment by a statute which professed [illegible]

* See also *Yeatman vs. Crandall, 11 La. Annual Rep., 220; Wallace vs. Shelton, 14 La. Annual Rep., 498.*

[illegible] war, the [illegible] Commissioners organized, and after the lapse of some time deposited their plans of work and estimates of costs, and prepared and caused to be homologated their tableaux of assessment. They collected a portion of the assessment and did some of the work projected. Until 1869 they continued to exist and to exert more or less activity in the line of their prescribed duties, but with what result can not now be definitely ascertained. The Legislature determined in 1869 to supercede the old Boards by a new system of administration. Mention of the facts brings down the present statement to the statutes of the second period.

It belongs to the history of the case, and should be observed here, that the Boards of Commissioners, in flagrant violation of law, proceeded to assess the City of New Orleans, on their tableaux, for the area of the streets in the districts to be drained. The fact being that throughout a large part of these districts no streets had at that

time or have since then been opened, made this action all the more extraordinary and unjustifiable. The assertion that the greater portion of the districts referred to, has always been in impassable swamps and marshes, will, it is believed, not be drawn into question.

## II.

### THE STATUTES OF THE SECOND PERIOD, OR THOSE OF 1869 AND 1870.

1. *Act 51 of the Acts of the General Assembly of the State of Louisiana of 1869 (Exhibit D).* The preamble to this Act recites that the drainage system inaugurated by the Act of 1858 had proved a failure in consequence of want of responsibility, and of unity of action on the part of the several Boards of Commissioners. To remedy the defects, Act 51 provided, that the three districts should be consolidated and the Boards of Commissioners abolished. In lieu of these Boards, the Act appointed a single Commissioner of Drainage, who was to succeed to their property, and to their power to levy and collect the drainage assessments. That is, he was to receive the plans and tableaux of the old Boards and to collect all assessments levied, and to levy and collect on such portions of the districts, as were not included in the plans and tableaux turned over to him. He was, however, to have nothing to do with the drainage work. That was to be done by the New Orleans and Ship Island Company, which was to receive all the collections in return for a canal and protection levee specified in the Act.

2. *Act 4 of the Extra Session of the Acts of the General Assembly of the State of Louisiana of 1870 (Exhibit E).* This Act abolished the office of Commissioner of Drainage and transferred his powers to the New Orleans and Ship Island Company. The Company was empowered to collect the assessments made, and to levy and collect them in the districts not covered by the existing tableaux.

## III.

### THE CANAL COMPANY, OR VAN NORDEN STATUTES.

1. *Act 30 of the Acts of the General Assembly of the State of Louisiana of 1871 (Exhibit F).* This Act is entitled:

"AN ACT *to provide for the drainage of New Orleans.*"

The title, it will be observed, makes no reference to the prior Statutes, and does not indicate that the Legislature proposed to amend, or to supplement them, or to modify, or use them in any manner.

The preamble of the Act recites the importance of efficient drainage, and states that the

> "Mississippi & Mexican Gulf Ship Canal Company *was prepared to immediately undertake the work* with the only kind of machinery adapted thereto, and now ready for use, and to *prosecute the same, with energy and economy, to completion.*"

Whatever else this preamble may be supposed to show, the above quoted recital must, it is believed, carry moral conviction that the Company referred to, was instrumental in procuring passage of the Act, which is thus introduced.

The provisions of Act 30 of 1871 are, in substance, as follows:

1. The Mississippi & Mexican Gulf Ship Canal Com-

pany was authorized to excavate the drainage and reservoir canals, and to build the protection levees specified in the Act (Sec. 1.)

The work specified was:

*a. On the upper side of New Orleans:* A large drainage canal and a protection levee above it, extending from the Mississippi River to Lake Pontchartrain. (Sec. 4.)

*b. On the lower side of the City:* A similar drainage canal and protection levee, also extending from the Mississippi River to Lake Pontchartrain. (*Id.*)

The locality and dimensions of both of these lines of works, were to be given by the Board of Administrators of the City. (*Id.*)

*c. In the rear of the city:* A reservoir canal, and outside of it a protection levee, extending along the shore of Lake Pontchartrain, and connecting the upper and lower protection levees above mentioned. (Sec. 2.)

This reservoir canal was to be 65 feet wide and 15 feet deep in the middle. The protection levee was to be not less than 100 feet wide, and high enough to protect the city from overflow from the Lake. (*Id.*)

*d. Interior draining canals:* In addition to the above canals and protection levees around the City, the Company was also to excavate all the interior smaller canals, 10 feet wide and upward, that might be required to drain the City and the lands in the rear. (Secs. 3 and 5.)

Had these canals and levees been completed, the boundaries of New Orleans would have been:

*On the south:* The Mississippi River.

*On the west:* The Upper Line Canal and Protection Levee.

*On the north:* The Reservoir Canal and Protection Levee, along the shore of Lake Pontchartrain.

*On the east:* The Lower Line Canal and Protection Levee.

And between these outlines there was to be a network of smaller drainage canals, sufficient in size and in number to effect the drainage of the area so enclosed.

The Board of Administrators of the City was required to *locate the lines* of the above canals and *to build and run the pumps and drainage machines* necessary to keep them free of water. (Sec. 6.)

The Company was required to *begin work* within a limited time, and with a defined machinery power. (Sec. 7.)

4. *Measurements of and warrants for work done.* The work done was to *be measured* at the end of each month by the City Surveyor, and a *certificate* given by him therefor.

On presentation of this certificate to the Administrator of Public Accounts, a *warrant* was given by him for the amount due, as shown by the certificate. This warrant was presented to the Administrator of Finance, who paid it, if he had funds to the credit of the Company. If he did not, he indorsed the date of presentation on the warrant, and it bore 8 per cent interest from that time. (Sec. 8.)

5. *Rate of Compensation for the Work.* Work thus done and certified and warranted for, was to be paid for at the rate of 50 cents per cubic yard of excavation and 50 cents per cubic yard of protection levee. (Sec. 8.)

6. *Fund for Payment of the Work.* The 9th Section declared that, "*in order to provide funds for the payment of the work to be done by the said Company,*" all the plans, tableaux, judgments, and assessments under the acts of 1858, 1859 and the amendments thereto, should be transferred to the Board of Administrators of New Orleans. The Board of Administrators succeeded to the rights and powers of the old Boards of Commissioners. The assessments made under former Acts, were declared

confirmed, and exigible at such times as the Board of Administrators might designate. The Board of Administrators were also authorized to levy an assessment of 2 mills per superficial foot on lands not already assessed. "*and to execute and enforce the same as provided for by the several acts of the Legislature, creating and regulating said Boards of Commissioners.*" Money collected from the old assessments and the new was to be kept in a separate account from other property, and held in trust for the Drainage Company, and used only to pay its claims.

What Act 30 of 1871 provided for may be briefly stated as follows:

1. It defined the outlines of a scheme of drainage.

2. It named the *contractor* to do the work and fixed the *rate of compensation* and prescribed the mode of ascertaining, evidencing, and warranting for work done.

3. It *provided a fund for the payment of the work* by transferring old drainage assessments to the Board of Administrators, and authorizing them to make additional assessments, and to collect both in the manner prescribed by former laws. And it required, that the fund realized from these assessments should be held in trust for the contracting Company, and applied exclusively to pay its claims.

4. It made it the duty of the Board of Administrators, to collect and pay over this specified fund to the parties entitled thereto under the Act.

March 27, 1871, by an amendment to their charter (R. p. 601) the Mississippi & Mexican Gulf Ship Canal Company accepted the provisions of Act 30 of 1871. This formal acceptance of the provisions of the Act had been preceded by a written notification on March 14, 1871, by the company to the City, that the former was ready to accept and commence work at once.

We have seen that before Act 30 of 1871 there is no law expressly declaring the City liable for drainage assessments. Hence, the action of the old Boards of Comis-

sioners in assessing the City was clearly illegal and of no effect. The contention of the plaintiffs is, on this head, that, however invalid the assessments may have been in the beginning, they were validated and ratified by the provisions of the Act of 1871, which declared that the old assessments were confirmed and made exigible. The correctness of this view is to be debated in the argument later on. It suffices for the present, to ask the Court to note, that it is inevitably true, even if ratification of the assessments of the City of New Orleans be, for arguments sake, assumed the consequence would be, that the City became liable for the amount of the assessments then standing on the rolls against it, and for nothing more. The City, therefore, in the cases supposed, would stand exactly in the same situation, as to liability, with all other assessees, that is, it would be bound to pay the amount of its assessment, but nothing beyond.

2. *Ordinance 814 of the City of New Orleans, Administration Series (Exhibit G), adopted April 25, 1871.* The plaintiff places great reliance on this Ordinance. It is all but certain, however, that the Drainage Company never accepted its provisions. At all events, the only evidence of acceptance which the plaintiff was able to adduce, was an extract from the oral testimony of a former president of the Company, Dr. Noyes; given in another suit (R. p. 343). That evidence is very vague. This witness appears to conclude, that the Ordinance was accepted, because, in his opinion, the Company went to work under it. But no resolution of acceptance, nor written notification of acceptance is shown. That the Company did not accept this Ordinance is at least morally certain, from the absence of all written proof of acceptance, and from the further fact that within less than a month before the passage of the ordinance, the Company had formally accepted the provisions of Act 30 of 1871, and had modified its charter so as to permit such acceptance.

The Ordinance begins and ends with a denial of the validity and constitutionality of Act 30. How then can it be said to consist therewith? In its third Section the Ordinance expressly notified the Drainage Company, that it denied its exclusive rights under Act 30, and that it did not admit such rights when directing the Company to perform particular work. Says this Section:

> "The City *expressly declares and notifies* the Mississippi & Mexican Gulf Canal Company that it does not waive its right *freely to contract* for the work of excavating the canals and erecting the levees required with the said Company or any other party, *as may hereafter appear to the best advantage of the City;* and that the directing or allowing the said Company to enter upon and perform any portion of the said work laid down, *is not to be considered as implying their exclusive right to its performance and completion, or to continuing* the same further or otherwise than *during the pleasure of the Council.*
>
> "The said company is further notified that *such work, and no other*, as shall be performed *with the consent and approval of the Council*, will be settled for as hereinafter provided."

Under Act 30, on the other hand, the Drainage Company was to have a *monopoly* of all drainage work, and that at *a fixed and exorbitant rate of compensation.* The ordinance denied the Company's right to this legislative monopoly, and fixed a rate of compensation, and claimed and notified the Company that the City had the right to contract with anybody, and for the best rates it could obtain. If the Company had accepted this ordinance, it would thereby have given up its great advantages under Act 30. It is inconceivable, it is submitted, that the Company would voluntarily accede to an ordinance, the very aim of which was to deny and impeach the legislative contract that had only three weeks before, been obtained and eagerly accepted.

Besides its repudiation of the validity of Act 30, the only important provision of Ordinance 814 is one which declares, that drainage warrants not paid within a year from their issuance, should be fundable in bonds of the City of New Orleans.

This provision was illegal and not binding on the City for several reasons. In the first place, the Legislature having regulated the matter of drainage by Act 30, and having therein provided how and from what fun of drainage should be paid, it was incompete City to make a different arrangement. So far harmony with Act 30 of 1871, no valid contract can therefore result from Ordinance 814. In the next place, the debt to be assumed might amount to several hundred thousand dollars, and no provision was made to meet it, as required by Section 47 of the City Charter of 1870. (Acts of the General Assembly of 1870, exhibit H.) So far forth *ex necessitate*, the Ordinance is *ultra vires*. The promise to issue bonds for the debt assumed, granting that there was one, was no more a provision for its payment, than would have been made, by the mere giving of a promissory note, or of any other evidence of indebtedness.

But the plaintiff contends, that the assumption of the entire drainage indebtedness by Ordinance 814, even if not originally valid, was ratified by the Legislature in 1872.

The Court will see that in point of fact there was no such ratification.

*3. Act 73 of the Acts of the General Assembly of 1872 (Exhibit I).* This is the Act from which plaintiff infers and argues the presence of a legislative ratification of the contract which he derives from Ordinance 814.

The Act embraces a number of objects. The only portion of the title which could have any possible relation to drainage or to any other public indebtedness reads thus:

> "AN ACT, * * * *to authorize the funding of the floating debt; to consolidate, limit, and provide for the debt of the City of New Orleans, principal and interest.*" * * *

Certainly this title does not indicate any intention on the part of the Legislature to *ratify* an illegal and invalid contract entered into by the City. *Funding the floating debt* of a city is very different from ratifying and giving effect to its invalid contracts. The *consolidation, limitation, and provision for its debt* is equally so. To deal with the then existing debt of New Orleans, whether by funding, consolidating, limiting, or providing for the debt, is one thing. To deal with the invalid contracts of the City for the purpose of ratifying them, is another and a very different thing.

But even if the Legislature had intended by Act 73 of 1872 to ratify an illegal contract of the City, it could not constitutionally have done this, under the title to the Act, because the Constitution of Louisiana of 1868, under the domain of which the Act was passed, (Exhibit J, Article 114), required that the *object* of a law should be stated in its title.

Proper examination of the Act in question, fails altogether to support the contention of complainants, that it extended the indebtedness of the City by making it liable for the entire cost of the drainage.

The only portion of Act 73 which relates to this subject is as follows:

> "SEC. 13. For unbonded *debts* existing Dec. 31, 1871, and unpaid at the time of the passage of this Act, or caused by receipts of certificates of 1871, for revenues proper of 1872, *and for* excavations and levees, drainage machinery and revetments authorized by law or required for the protection of the City from overflow or inundation, the City may issue, from time to time, as they may be required, bonds of the denomination of $500 and $1,000. * * *
>
> "No bonds shall be issued but by authority of the Council, nor for a lower rate than 90 cents on the dollar; all issued for excavations and levees, authorized by Act No. 30 of 1871, or by drainage laws previously enacted,

shall be marked 'Drainage Series;' *and all taxes collected for drainage, and not required for the payment of drainage warrants*, shall be devoted to the purchase from the lowest bidder, of bonds issued for drainage."

The position of complainant is understood to be, that the effect of this Section was to make the City primarily responsible for the entire cost of drainage, and to transfer to the City the drainage assessments for its reimbursement.

Apart from all other considerations, the title of an Act is of greatest value in determining the meaning and extent of the ambiguous terms and provisions found in it. The very object of the title is, to show the matters which the legislator intended to deal with and regulate. Hence, every term or provision of the Act, *is presumed* to refer to the matter mentioned in the title, and if any term or provision is capable of two constructions, one referable to the matter of the title, and the other not, the term or provision must be taken in the sense covered by the title.

Act 73 of 1872, then, was evidently an Act to enable the City of New Orleans to liquidate and arrange its indebtedness. So far as the Act relates to Drainage Warrants issued under Act 30 of 1871 already referred to, Act 73 was, at most, merely an offer on the part of the State and City to permit funding of the warrants into bonds, which were designated. The bonds were to be marked "Drainage Series," and they were to be paid out of the drainage fund, after the payment of the warrants; and no other provision whatever was made for retiring or paying the principal. It results very clearly, that Act 73 only empowered the City, when it might be found expedient to do so, to issue bonds of the same tenor with the warrants to be taken up, that is, payable out of the only funds provided for, *and on condition that the same proved sufficient*, namely, out of the funds to be realized from the collection of the drainage assessments; and, consequently, that the bonds, on their very face, were to be subject to like limitations and restraints with the warrants themselves.

What the authority for the drainage warrants, issued by the City of New Orleans was, does not admit of doubt. There is no evidence, it is believed, deserving of serious discussion, which shows that the Drainage Company ever acceded to Ordinance 814, already referred to. On the contrary, there are the best reasons, as has been seen, for judging that the Company never would have consented to surrender the enormous monopoly secured by Act 30 of 1871, for such precarious rights as might be acquired by competition, under the provisions of the City Ordinance 814. This Ordinance, indeed, did not even make proffer of any contract. It merely notified the Company, that the City of New Orleans did not recognize the rights conferred by Act 30 of '71, but notwithstanding its denial of the same, that the City would designate such work as it desired to have done, and would pay for that work when performed, in a different manner from that prescribed by Act 30. It was expressly declared, moreover, that the City would cease to act under the Ordinance at any time it might deem fit to do so. The only contract, then, that could possibly have arisen under the Ordinance, would have been for work actually done under the terms thereof. But even against claims for work so done, there would have been a perfect defence, in consequence of the evident inability of the City to enter into a different contract, from that made for her by the Legislature of the State, by Act 30, and in consequence, moreover, of the illegality of the City Ordinance itself, as resulting from the incurring of a debt, without there being provision made for the payment of it.

It is a matter of fact, that no warrant is now in existence, or ever was uttered, which professes to be for work done under Ordinance 814. The Drainage Company, from the beginning to the end of its operations, never received a warrant which did not in express terms claim to be issued under Act 30 of 1871. Even the warrants issued from July, 1871, to June, 1872, expressly refer to Act 30 of 1871, and

do not mention Ordinance 814. It is true, that these warrants include a stipulation that they shall be fundable in city bonds which are of the same character with those described in Ordinance 814, but the authority for the warrant, as given by itself, *is the Act of the Legislature*, and not the Ordinance.

Complainants' construction of Act 73 of 1872 must lead to consequences which are utterly inadmissable. If the City of New Orleans became solely responsible for the drainage, as is contended, it must discharge the cost of the same for another parish than the Parish of Orleans, and for another city, and release that city from all participation in the acceptance. But such a responsibility would be, it is believed, wholly without precedent and conspicuously unlawful. If, however, complainants' position be correct, this must be the result to the City of New Orleans.

A large part of the Second Drainage District was during the time of the transactions involved, in the Parish of Jefferson, and was covered by the City of Carrollton, which had been incorporated since 1859. (Act 277 of the Acts of the General Assembly of the State of Louisiana, of 1859, Exhibit K.) This area was not annexed to and incorporated with the City of New Orleans until March 23, 1874 (Act 71 of 1874 of the Acts of the General Assembly of the State of Louisiana, of 1874, Exhibit L), *nearly two years after the passage of Act 73 of 1872*. Now, if the City of New Orleans was required by the latter Act to pay for *all* drainage with her bonds, then it follows, inevitably, that she was required so to pay, for drainage done in the City of Carrollton, which was then as distinct from New Orleans as is any other city in Louisiana. A construction which leads to such a conclusion is, it is again submitted, manifestly erroneous.

Complainants' contention that Act 73 of 1872 is to be considered as a *ratification* of Ordinance 814 fails of all substantial support. The Legislature certainly did not

ratify that ordinance, unless it knew of its existence, and the plaintiff has not offered even the commencement of proof to show, that the Legislature had such knowledge. It has not been made to appear that the Legislature, or a single member of it, had ever so much as heard of the ordinance. It has not been shown that the City or the Drainage Company, or Van Norden, or anybody else, ever undertook to bring the ordinance to the knowledge of the Legislature. The act itself does not mention or refer to the ordinance. The provisions relative to the funding of the drainage indebtedness of the City, are just such as might have been, and no doubt would have been, put in a general funding act, if Ordinance 814 had never been adopted. It is beyond belief, that if Act 73 was intended as a ratification of Ordinance 814, it should have omitted all reference to the ordinance, and that there should not be *a scintilla of* evidence outside of the act to show the intention.

It has been already indicated, that all that Act 73 of 1872 did, was to permit the City to issue bonds of the same tenor as the warrants to be taken up, that is, payable out of the drainage fund.

The City, however, proceeded to issue her own 7 per cent fifty-year gold bonds, Drainage Series, to take up drainage warrants of the face value of $1,375,994.25. (R., p. 78.) The face of the bonds given in exchange, and as payment for these warrants, was $1.538,764.12. The warrants thus retired by bonds, together with about $50,000 more paid in money, included in point of fact every warrant issued for drainage work, from the commencement of operations by the Company in June, 1871, to Dec. 31, 1874. (R., p. 78.)

It must be mentioned here, that in May, 1872, Warner Van Norden agreed to lend the Company $150,000, to be secured by the transfer to him of the Company's privileges and rights under Act 30 of 1871. R.,

pp. 603, 604. In November of the same year, the Company sold and transferred to Van Norden its rights and privileges under Act. 30 (R., pp. 603-605, 606). Both loan and transfer were by notarial act, and neither of them makes any allusion to Ordinance 814. This omission would seem unaccountable, if the Company had really accepted a contract proffered by that Ordinance and had acquired valuable rights under it. After November, 1872, the drainage warrants were issued to Van Norden, Transferee, and the Company no longer appears.

4. *Constitutional Amendment of 1874.* In 1874 was adopted an amendment to the Constitution of the State of Louisiana, to take effect Jan. 1, 1875, and forbidding the City of New Orleans to increase its debt.

The amendment reads:

> "The City of New Orleans shall not hereafter *increase her debt in any manner or form, or under any pretext.* After the first day of January, 1875, no evidence of indebtedness or warrant for the payment of money shall be issued by any officer of said City, except against cash actually in the treasury; but this shall not be so construed as to prevent a renewal of matured bonds at par, or the issue of new bonds in exchange for other bonds, provided the City debt be not thereby increased, *nor to prevent the issue of drainage warrants to the transferee of the contract, under Act No. 30 of 1871, payable only from drainage taxes, and not otherwise.*"

This amendment was proposed in the Legislature on Feb. 24, 1874, and was voted on by the people, in November, 1874. It was adopted, and became effective as a part of the Constitution Jan. 1, 1875.

After the 1st of January, 1875, the City of New Orleans ceased to issue its bonds, in exchange for drainage warrants. Van Norden, as transferree of the original legislative contract, continued work, and warrants were issued to him in conformity with Act 30 of 1871 and

with the Constitutional amendment of 1874. The following is the form of warrants so issued to Van Norden:

No... DEPARTMENT OF PUBLIC ACCOUNTS.

$.... New Orleans,.....187..

*To the Administrator of Finance,*
City of New Orleans.

Pay to the order of W. Van Norden, Transferree of the MISSISSIPPI AND MEXICAN GULF SHIP CANAL COMPANY, .....and $\frac{}{100}$ Dollars, out of any funds in the City Treasury to the credit of said Company.

THIS WARRANT is issued in accordance with the provisions of Act 30 of the Session of the General Assembly of the State of Louisiana held in the year 1871, and the Administrator of Finance, on the presentation to him of this Warrant, will pay the same in Cash, in case there be any funds in the City Treasury to the credit of the said Mississippi and Mexican Gulf Ship Canal Company; but should there not be sufficient funds to cash this warrant, then the Administrator of Finance is required to endorse upon the same the date of its presentation, and this warrant shall bear interest at the rate of 8 per cent per annum from and after the date of such presentation and endorsement, until paid.

CHARGE Mississippi and Mexican .....
Gulf Ship Canal Company. *Adm'r of Public Accts.*

Presented for payment.....187..

.....
*Administrator of Finance.*

The above is the form of all the drainage warrants now outstanding and unpaid. All that were uttered for drainage work were issued between Jan. 1, 1875, and June 1, 1876. The aggregate face amount of those now outstanding, given for work, is about $360,000, exclusive of interest. An additional amount of $320,000 was issued under Act 16 of 1876, and the transfer thereunder.

5. *Act 16 of the Acts of the General Assembly of the*

*State of Louisiana of 1876 (Exhibit M), and the Transfer thereunder.* This Act, on Feb. 24, 1876, *authorized* the City, *if the Council deemed it advisable*, to buy out Van Norden's rights and franchises under Act 30 of 1871, and also his dredgboats and other drainage machinery. The price was to be paid in drainage warrants issued in the form of those prescribed by Act 30, and payable out of drainage assessments.

After the purchase so authorized, it was provided by Act 16:

> "The City of New Orleans, through its officers, shall have *exclusive control* of all the rights, powers, and franchises granted by Act No. 30 of Acts of 1871, relative to drainage or other public works, to the Mississippi and Mexican Gulf Ship Canal Company, or its transferee; the City of New Orleans shall alone *have power*, either through its own officers and employes or by contract to the lowest bidder, to do all canaling, dredging, ditching, or drainage work required to be paid for by assessment upon property, or from the City Treasury."

Act 30 of 1871 had provided that the Drainage Company should construct the outside, or boundary canals and levees, and all interior drainage canals, ten feet wide and upward. The drainage assessments were dedicated exclusively to the payment of this work. All interior canals less than ten feet in width, and all other drainage work, and the pumping out or the canals was to be done at the City's own expense. The drainage work was to be paid for from the assessments, or from the City Treasury. The Act of 1876 declared, that if the City purchased from Van Norden, she should thereafter have full control of *all* drainage work—both that which was to be paid for from the assessments, and that which was to be paid for from the Treasury of the City. The Act does not, in terms, neither does it by implication even, put the City in a different position as to either class of work from that which had been occupied before by her-

self or by Van Norden. *If* the purchase was consummated, *then* the City would succeed to the position of Van Norden, as to that portion of the work which had fallen to him under Act 30 of 1871, and would remain in the same position which she had always occupied as to the remainder of the work. The Act nowhere says, or intimates, that the City's duties or responsibilities in relation to Van Norden's part of the work should be greater than, or in any respect different from, the duties and responsibilities which Van Norden himself had assumed with regard to that work. The City, therefore, succeeded to Van Norden, just as Van Norden himself had succeeded to the original Company.

Act 16 of 1876, then, it need scarcely be remarked, did not by its own effect change or disturb the relations then existing between Van Norden and the City. It merely conferred upon the City an authority to buy, if it could come to an agreement with Van Norden upon the price to be paid, and he was willing to sell. No purchase could be made without Van Norden's consent, and whether he would or would not give that consent remained to be seen. The City was not bound to buy, and Van Norden was not bound to sell. The City might decide not to buy; Van Norden might refuse to sell. All that the Act did, was to *permit* the City to buy in the future. If any sale took place, the mutual rights and liabilities of the parties thereto would arise at the time of the sale, and certainly not before.

It was not until the 25th of April, 1876, that the City acted on the authority conferred by Act 16. On that date an Ordinance (No. 3479, R. p. 241), was passed, directing the City Surveyor to inspect and appraise the dredgeboats and drainage machinery then owned by Van Norden. The Surveyor valued the dredgeboats and machinery at $153,750. He also reported that the City was liable to Van Norden in damages for certain delays in the further sum of about $150,000. (R. pp. 241–247.) Acting on this

report, the City, May 23, 1876 (Ordinance 3539, R. pp. 247–248,) authorized the Mayor to buy Van Norden's dredgeboats and machinery, and settle his claims for damages for the sum of $300,000 in drainage warrants, and to pay him an additional sum of $20,000 in drainage warrants for sums to that amount said to have been collected by the City and not paid over to the drainage fund. Pursuant to this authorization, the Mayor executed an act of purchase from Van Norden on June 7, 1876. (R. pp. 248–254). Whatever rights Van Norden acquired from his sale to the City date from June 6, 1876, when the sale was agreed to and consummated, and are subject to all legislation then in force respecting the City's indebtedness.

6. *Litigation respecting the enforcement of Drainage Assessments.* The principal suits bearing upon the exigibility of the drainage assessments are the following:

*a.* The *fi. fa.* suits in 1874, *27 La. An. Reports, p. 469.* Before Van Norden sold out he brought suit to compel the City to proceed to the collection of the drainage assessment by issuing writs of *fieri facias.* The City resisted, and averred that the issuance of the writs would be a useless expense. It was decided by the Supreme Court of the State, that it was the duty of the City to issue the *fi. fa's.* It at once proceeded to do so, and issued in all 1,571 writs. These were issued against property carefully selected and pointed out by Mr. Guthrie, Van Norden's agent for several years prior to that time, to assist the City in the drainage collections. Mr. Guthrie testifies, that he selected the property which was most valuable, and likely to bring the amount of the assessments. (R., p. 632, 635, 637.)

These proceedings were almost destitute of result. The entire amount realized by the City was about the sum of $32,000. If there be deducted from this the property bought in by Van Norden, and paid for in warrants, the amount of cash collected was only $22,000. From this had to be deducted attorney's fee, costs of unsuccessful

executions, and the other expenses attendant on the proceedings. The net product to the drainage fund was practically nothing at all. (R., pp. 646, 744, 746, 593-598, 617-618, 758.)

With this result from the best and largest assessments, it is not surprising that the City of New Orleans abandoned the attempt to collect under execution, and that no holder of drainage warrants has ever deemed it worth while to mandamus the City to proceed further in that course. Even the present complainant has never resorted to a like remedy, though he has, it is believed, invoked every other afforded by the law. The drainage warrant holders have silently acquiesced in the City's abandonment of this costly and unproductive procedure.

*b. The Case of the Succession of Irwin, 33 La. An. Reports, p. 63.* In this case the Supreme Court of Louisiana held the creation of the Fourth Drainage District under Act 30 of 1871 to be illegal, and the judgment for drainage tax in that district void under the title of "An act to provide for the drainage of New Orleans." Act 30 could not, it was decided, constitutionally, under such a title, provide for a new drainage district, and still less for extraordinary proceedings to coerce payment of drainage taxes. This decision rendered the collection of drainage taxes, in the whole of the Fourth Drainage District, impossible. (Exhibit O)

*c. The case of Davidson vs. the City of New Orleans, 34 La. An. Reports, p. 176.* In this case the Supreme Court of Louisiana held, that where the drainage works were shown not to have benefited the lands assessed, the assessment against them was null and uncollectible. The consideration of the judgment, which was prospective drainage, having failed, the eventual debtor was, according to the Court, both in law and equity, entitled to relief. (Exhibit O)

An appeal was taken from this decision to the Supreme Court of the United States, but was dismissed, on the

ground, that the matter decided was not subject to review by that court (96 U. S.)

Under the Davidson decision, the City could no longer collect the assessments in the greater part of the First and Third Districts, and in almost the whole of the Second District.

*d. In the matter of the Commissioners of the First Drainage District, praying for the homologation of the assessment roll, etc., 27 La. An. Reports, p. 20.* In 1875 the Supreme Court of Louisiana decided, that the rolls prepared in the First Drainage District must be homologated under the Act of 1861. The grounds of opposition to the homologation considered and decided, do not, it is submitted, conflict with either the *Irwin* or the *Davidson case*.

The judgment of the court was in the very terms of Act 57 of 1861. The judgment can, of course, have no other or wider effect than was given by the Statute.

The Court declares in the commencement of the decision (p. 21):

> "We think it necessary to consider *only* the following grounds of opposition herein, as argued before us:
>
> "1. That some of the lands upon which this assessment is levied were drained at their cost under Act No. 49 of 1839, and are by the 13th section thereof specially and forever exempted from any further assessment for draining.
>
> "2. That by Act 165 of 1858, the assessments for draining any one section or district, shall not exceed $350,000, which sum has already been nearly exhausted, and the present assessment is for $450,000 additional.
>
> "3. That the money can not be collected in advance of the completion of the work."

After considering the above objections *seriatim*, the Court adds:

> "There are *other grounds of opposition* in the record, but they *have not been urged* before us, and we find nothing in them demanding attention." (P. 23.)

The decision is authority, it need scarcely be said, for the points only which are expressly ruled.

WORK DONE BY THE DRAINAGE CO. AND VAN NORDEN.

Before concluding this part of the present statement, it may be profitable to give some account of the drainage work done by the Drainage Company and by Van Norden.

The Upper Protection Levee and Canal were nearly completed. Beginning at Lake Pontchartrain, the Levee Canal did not reach the Mississippi river by about a quarter of a mile, and the levee for some distance before its termination, was not shaped and finished.

On the Lake Front, only about four-tenths of a mile of the projected Protection Levee and Reservoir Canal were constructed. The total length of this line, was to have been over four miles, so that the part completed was less than one-tenth of the whole line.

On the lower side of New Orleans, the Canal and Protection Levee were begun, but had not reached within a mile of the river, at the point where the work was abanbandoned. Perhaps about half of this line was completed.

All of the outside lines were, therefore, incomplete. There was a gap a quarter of a mile in the upper line; of more than three miles and a half in the Lake Shore line, and of three or four miles in the lower line.

Besides the detached portions of work done on the outer lines, a few interior canals had been dug or deepened.

Estimates are made that not more than two-thirds of the entire work had been completed in 1876.

The principal facts regarding legislation, contracts, ordinances, and the work of drainage, out of which this litigation has arisen, have now been sufficiently stated.

It remains to review the demand of the complainant and the defenses thereto, of the City of New Orleans.

PLEADINGS.

The complainant in the instant case instituted, first, proceedings on the law side of the Circuit Court as holder and owner of three of the drainage warrants issued to Van Norden after Jan. 1, 1875. The court rendered judgment on these warrants, but declared them to be "*payable out of the Drainage Taxes.*" After issuance of execution on that judgment, and its return unsatisfied, the present equttable action, for an accounting of the drainage taxes, and to charge the City of New Orleans as trustee with waste and damage, was brought. The bill sets forth the several statutes on the subject, the assessments and tableaux made under them, the doing of the work, and the issuance of the warrants.

In addition to these averments, and in relation to the City's liability, the bill further, in substance, avers:

1. That under Act 30 of 1871 the City of New Orleans became *trustee of the drainage assessments.*

2. That in the proper discharge of this trusteeship it was the City's duty:

*a.* To pay the *assessments against herself.*

*b.* To use *due diligence* in attempting to collect the assessments against the assessees other than herself.

*c.* To *pay over* all sums thus collected to the parties entitled under the Act.

*d.* To *complete* the drainage system from the point to which it had been carried by Van Norden when he sold out to the City in 1876.

3. That the City has *violated* her said duties as trustee:

*a.* In that she has *not* paid her own assessments.

*b.* In that she has *not* used due diligence to enforce payment of the assessment other than her own.

*c.* In that she has *misappropriated* sundry sums actually collected from the assessments, applying them to her own uses, instead of paying them to the parties entitled under the Act.

*d.* In that it did not *complete* the drainage system be-

gun by the Company and Van Norden, so as to give a value to lands subject to the assessment, and worthless if not drained.

The bill then prays, that the City be ordered to account for all sums collected, or that should have been collected, by her as trustee of the drainage assessments, or that it could have collected, if it had completed the drainage system, and also for sums collected and misapplied. (R., pp. 1-19.)

The answer of the City (omitting detailed references to the acts establishing the drainage trust, and to the later legislation affecting it) may be summarized as follows:

*a.* That under none of the statutes herein involved, of 1858, 1859, and 1861, *was it competent to render a general personal judgment against owners of property assessed, nor was any authority conferred upon the Board of Commissioners or upon the Board of Administrators of New Orleans, to assess the City on its streets and public places; and that all assessments for drainage on the same are null and void.*

That Act 30 of 1871 required payment for drainage work to the Mississippi & Mexican Gulf Canal Company, *solely out of the drainage fund therein established, and which was nothing more than the drainage assessments when legally laid and collected.*

That under Act 73 of 1872 the City was merely authorized to fund drainage warrants into 7 per cent bonds,; that Act 73 did not purport tocreate any new indebtedness by the City, but only to provide for funding its existing indebtedness; and that Act 73 did not impose upon the City as its debt, the whole cost of the drainage done under Act 30 of 1871. That the utmost that can be claimed, is, that said act impliedly recognizes said invalid and void assessments on the streets and public places (denial of the validity whereof is set up in the answer), and it must result by issue under the Act, of bonds of $1,600,000, that the *City satisfied more than*

*double the amount claimed to be assessed against it, and that the drainage fund thereby became largely indebted to the City.*

That the City was not bound to complete the drainage

A

That the provisions of Act 30 of 1871, which were afterward construed to invest the Board of Administrators of the City of New Orleans with the powers conferred by Act 57 of 1861 on the Boards of Commissioners, *were unconstitutional and void.* And that the pretended judgments of homologation, mentioned in complainants' bill as obtained by the Board of Administrators of the City of New Orleans under said Act No. 57 of 1861, *were null and void, and were so held and decreed in the matter of the Mississippi and Mexican Gulf Ship Canal Company vs. The City of New Orleans, 35 Annual Rep., p. 68, and by virtue and effect of this judgment that complainants are barred from claiming any relief in this proceeding, by reason of said assessments and judgments,* and that no validity or force is attachable to Ordinance No. 1359, adopted Feb. 7, 1872, the same being null and void, *and having been so declared by the Supreme Court of Louisiana in the cases known as the Succession of Irwin, 33 La. Annual Rep., p. 63; 34 La. Annual Rep., p. 97; 35 La. Annual Rep., p. 68.*

[illegible] judged and decreed that the exceptions of defendant to the Master's Report be sustained, and his account amended to conform to the opinion of the Court, and that the bill of the complainant be dismissed at his cost (R., p. 779). From this decree the complainants have prosecuted the present appeal (R., p. 780).

The attention of the Court is requested, in the outset, to the legal character of the drainage warrants, and to the relations of the present holders of them to Van Norden, to whom they were all first issued, and from whom they have passed to those who now hold them. The warrants are in no sense negotiable instruments, nor do they possess any of the incidents of negotiability. The assignees of them acquired them, subject to all the defences and equities against them, while they were still owned by Van Norden. As in the case of all other assignable but non-negotiable obligations, the transferee took the same position with that the transferer had held, and no better. The transfer did not, consequently, cut the City off from any defence she could have urged against the original obligee.

The law, in this connection, is well established. Says Judge Dillon:

> "Ordinary warrants or orders, negotiable in form, may be made by the proper officers; and in many of the States such instruments may be transferred by delivery or indorsement, and the holder sue thereon in his own name, yet they are not *commercial or negotiable paper* in the hands of holders, so as to exclude enquiry into the legality of their issue, *or preclude defences thereto.*" *Mun. Corp* § *487.*

So, too, another text writer says:

> "Orders, drafts, and warrants which are drawn for payment of municipal debts by one public officer on another are not, however, *negotiable*, and are only transferable *subject to defences originally existing against them.*" *Randolph on Commercial Paper, Vol. 1, § 337.*

The law on the subject received full consideration from this Court in *Mayor vs. Ray*, 19 *Wallace Reports, p. 468.* It was settled by the Court, in that case, upon principle and upon historical enquiry, that municipal corporations have not the power, without legislative authority expressly or clearly implied, to borrow money or to issue notes, bills,

or other securities of a commercial character, free from equitable defences in the hands of *bona fide* owners. Such corporations, according to the Court, are of a public character, instituted for the purpose of local government, and constitute part of the domestic government of the State. The power of taxation is given to them for the purpose of raising the means of carrying on their functions, and the creation of such special power is exclusive of others.

In the course of the opinion the Court proceeds to say:

> "Vouchers for money due, certificates of indebtedness for services rendered, or for property furnished for the uses of the City, orders or drafts drawn by one City officer upon another, or any other service of the kind, used for liquidating the amounts legitimately due to public creditors, are, of course, necessary instruments for carrying on the machinery of municipal administration, and for anticipating the collection of taxes. But *to invest such documents with the character and incidents of commercial paper*, so as to render them in the hands of *bona fide* holders absolute obligations to pay, however irregularly or fraudulently issued, is *an abuse of their true character and purpose.*" *The Mayor vs. Ray, 19 Wall. 477.*

*In Bayerque vs. City of San Francisco, 10 Meyer's Fed. Dec., sec. 1989*, the Circuit Court for California, gave effect to these and to similar views, in a decision which is of direct application in the present case. Treating the subject of municipal warrants, the Court said: "There " are other considerations which conduct to the conclu- " sion that these warrants can not be treated as bills of " exchange. A fatal objection is the fact that, upon their " face, the payments are restricted to, and must come out " of a particular fund. It is true that the mention of a " particular fund, out of which a payment is to be made " will not in some cases prove fatal to the character of the " instrument as a bill or note; but it is confined to that

" class of cases, where the mention of a particular fund is " directory, and reference made to it with a view simply to " enable the drawee to look to his reimbursement. But in " *all cases where the payment is especially limited, and is* " *to come out of a specific fund mentioned, however ample* " *it may seem, it is fatal to the character of paper as a bill* " *of exchange.*" *Parson's Mer. Law, '87.*

In consideration of the foregoing authorities, the claims and defences which have arisen in this case, will be discussed exactly as they would have been, had the suit been brought by Van Norden himself instead of by his transferees. The transferees, it is clear, have no greater rights than Van Norden would have had, and may be met with the same defences.

I.

*The assessments for drainage against the City of New Orleans, on its streets and public property, were null and void; but even if it be admitted, for sake of argument, that the City owed the assessments to the drainage fund, the City as a trustee, must be credited with the amount for which it relieved the fund by issue of bonds under Act 73 of '72.*

Is the City, as a municipal corporation, indebted to the drainage fund for assessments upon the streets and

lic squares, and other public property, to the

00,000?

slature, as has been seen, levied the drainage tax upon a certain area. According to the letter of the law, as complainant contends, it made the *owners of* the property affected, and the City especially as one of them, personally liable. Now it is against all right reasoning, and the best authorities on the subject, to assume that it was designed in this way to subject Public Places to a lien for a tax, and to convey therewith, as a consequence, the power to foreclose and sell the public property so burdened. Lands occupied by streets, the landings, squares, parks, markets, the Arsenal, and other public places, the Court Houses, and

Municipal Courts, the Municipal or City Hall, the parish and police jails, school houses, engine houses, and other structures and buildings dedicated to public and corporate uses, are essential to the discharge of the public, police and govermnental functions of the municipality, as political subdivisions of the State government. In the case before the Court, the Customhouse and Mint of the United States were actually included in the assessments. In connection with property as here enumerated, the *jus disponendi* can not exist. Nor does it consist with a true understanding of the term owner, to associate it at all with the relation of the City of New Orleans to Public Things, properly so called. The City as a body, corporate and politic, is as to such things merely an Administrator, and the things themselves are *out of commerce*. Such things are, indeed, always presumptively exempt from the operation of general tax laws, because it is only reasonable to suppose, that they are not within the intent of the Legislature, in exercising the taxing power. The reason for the presumption here referred to, is well given in Cooley on Taxation. According to that learned writer, for the Legislature to tax the public property owned by its municipal divisions, would render necessary new taxes to meet the demand of these taxes, and thus the public would be taxing itself, in order to raise money to pay over to itself, and no one would be benefited by the officers em ployed. *Cooley on Taxation, p. 131.*

Says the work here cited:

" It is always to be assumed, that the general language " of statutes is made use of *with reference to taxable sub-* " *jects*, and the property of municipalities is not in any " proper sense taxable."

In *Desty on Taxation*, Vol. 1, p. 48, the law is laid down to the same effect. Says *Desty:* " The tax law of " a State applies to persons only, and not at all to politi- " cal bodies, like municipal corporations, which exercise

" in different degrees the sovereignty of the State. *The* " *property of such bodies is not subject to taxation.*"

In *Town of West Hartford vs. Board of Water Commissioners, 44 Conn. R., p. 368*, the Supreme Court of Connecticut said: "The proceeds of one " assessment must be protected against a second, " else possibly the public money, might be eaten up " by the cost of successive assessments and collec- " tions, on its passage from the tax payer to the pub- " lic creditor. So well established is this principle that, if " the statute relative to the assessment and collection of " taxes, had contained no reservation whatever, in favor of " property held by cities and towns for public purposes, " the Court *would have assumed that the legislature did* " *not include such in the term 'taxable property,'* but that " these words were used with such limitation as repeated " judicial decisions and approved commentators upon law " have put upon them."

In what appears to be a leading case, *Louisville vs. Commonwealth, 1 Duval, pp. 295–96*, the Court of Appeals of Kentucky says: "The tax law of Kentucky construct- " ively applies to persons only, and not at all to political " bodies exercising in different degrees the sovereignty of " the State. Were this not true, then the statute literally " embracing all persons, and the State being in one sense " a person, her capitol, and penitentiary, and other public " property would, like the estate of a natural person, be " subject to assessment for taxation, and so, too, would " the court houses, and jails, and poor houses of all the " counties of the State. *But neither a State nor a county* " *has ever been considered a person contemplated by any* " *tax law ever enacted.* And does not the only reason " for their constructive exclusion, equally except the mu- " nicipal property of Louisville, used for the convenience " and facility of its local governments?"

Referring to express exemptions in the statute under examination, the Court proceeded to observe, that it was

not to be implied that municipal property used for public purposes of local government was intended by the legislature to be subject to taxation.

The Court then added: "To assume this, would involve "the absurdity of taxing the public property of the state and "the counties. *But no jurist could have ever apprehended "such an assumption; and, therefore, the legislature was "not guilty of the folly, of expressly exempting that which "no rational construction could have made subject to the "tax law.*"

So too the Supreme Court of Tennessee, in *Mayor and Aldermen of Nashville vs. The Bank of Tennessee, 1st. Swan's Reports, p. 271*, declared, that they could not see how public property can, in any just sense, be considered as a source of revenue to be derived by the exercise of the taxing power, *for it is by the exercise of that power that it is separated from private property, and becomes public.*

In *Trustees of Public Schools vs. the City of Trenton, 30 New Jersey Reports p. 680*, the reasoning and authority of *Cooley on Taxation* in the place already cited, received the approval, and were adopted by the Court of Errors and Appeals of the State of New Jersey. That decision is referred to, in particular, because it is accompanied by a note which appears to collect all the cases to date. The Court concluded, after elaborate argument at bar, that "the property of the State and its political subdivisions, *is "not taxable under general statutes providing for taxa-"tion.*"

The foundation of the jurisprudence of Louisiana is the Roman Civil Law, but in that law the same principles, with those enforced by the text writers, and by the courts just referred to, have been always maintained by the Supreme Court of the State.

In *De Armas et al., Mayor, etc.*, of *New Orleans*, 5 La. R., pp. 159–169, Judge Martin classed, on the authority of Domat, among public places, as out of commerce, those

which are for the use of the inhabitants of a city or other place, and in which no individual can have any right of property, as the walls, ditches, or ~~gutters~~ gates of a street, and public squares.

That Judge, after citing the *Partidas*, said: "Thus "highways, streets, squares, ports, and other public places "in Louisiana, passed by the retrocession to France, and, "by her sale, to the United States, became the property "of the former as component parts of the province. Yet "their legal character was not changed, and they re- "mained, in the hands of the new owner, public things, "*hors de commerce*, inalienable as they were before the "sale and transfer; the transferee acquired no other "right thereon than that which the transferor possessed, "*i. e.*, that of regulating the use."

In *Xiques vs. Bujac, 7 La. Ann. R., p. 503*, Chief Justice Eustis observed, that there was no authority before the Court, calling for any modification of the general doctrine of the dedication to public use as expounded in previous decisions. The Chief Justice then referred to *Rowan's Executors vs. Town of Portland, 8 Ben Monroe's Reports, p. 243*, decided by the Court of Appeals of the State of Kentucky, as the fullest recent case on the subject, and proceeded to express his assent to the doctrine of the Court of Appeals; and it is in *Xiques vs. Bujac* that will be found the following language of Justice Preston: "Now, things may be made public by "man as well as by nature. Things, says our code, "which are for the common use of a city, as streets and "public squares, are likewise public things. When they "become so, they are out of commerce, to be neither "bought nor sold, *and the term title is inapplicable to "them; there is no fee in them.*" *Civil Code of La., Arts, 448, 449, 450, 453, 454, 455. Dr. Taylor's Elements of the Civil Law, p. 471. Police Jury vs. James Toulhouze, 30 La. Ann. R., p. 64. Egerton vs. Municipality, 1 La. Ann. R., p. 435. Police Jury vs. Michel,*

*4 La. Ann. R., p. 84. Pickett vs. Brown, 18 La. Ann. R., p. 560. City of Baton Rouge v. Bird, 21 La. Ann. R., p. 244. Sheen vs. Stothart, 21 La. Ann. R., p. 630. Dillon on Municipal Corporation, Sec. 521.*

It is to be added, that when the assessment rolls in question were filed, the Public Places of the City were sought to be designated in the most irregular, unlawful, and unheard of manner. In the second and third drainage districts, the amount assessed against the city was actually put down in *lump sum*, in so many words, *as against all the streets*. Except a calculation of superficial feet be taken as descriptive, there are, in the districts named, no descriptions. R., pp. 149, 150, 174.

It is by depositing in Court such assessment rolls as these, and by homolgating the same, under the summary and extraordinary process of a constructive citation by publication, that the City, according to complainant's views, *sued itself*, and that judgments were renrendered burdening with enormous debt the *Public Property*, and entailing, besides, personal responsibility on the corporation! R. pp. 144, 149, 155, 161, 168, 173, 265.

Application to the facts of the present case, of the principles and authorities, which have now been referred to, will convince the Court, that the assessments levied upon the streets and public places of New Orleans, contended for by complainant, are null and void.

Assessments in the First and Second Drainage Districts were laid by the Drainage Commissioners on the 12th of September and the 12th of March, 1861, respectively. The Commissioners assumed to be authorized by and to proceed under the Acts of '58 and '59; and enforcement of the drainage tax was sought by recourse to the summary proceedings provided by Act 57 of 1861. In the Third Drainage District assessments were laid June 11, 1872, by reason of and in consequence of Act 30 of '71. Assessments were laid in the Fourth District also under Act 30. Assessments in the Third and Fourth Districts were laid

by the City of New Orleans. In the First District homologation of the assessments of the first installment was had in 1863, and of the nine remaining instalments, in 1874. In the Second District, homologation of all the installments was effected in 1868 and 1869. Proceedings for homologating the assessment rolls in the Third District were filed June 17, 1872, only. Authority for so proceeding was found in section 9 of Act 30 of 1871.

Authority for proceeding June 7, 1872, for homologating the assessment rolls in the Third District (R. p. 171) was found in Section 9 of Act 30 of 1871. The section authorizes the Board of *Administrators of New Orleans* to lay assessments of *2 mills per superficial foot in the three drainage districts created by the Acts of 1858 and 1859, and the amendments thereto, and on such other lands as may be brought within the protection levees contemplated by Act 30, where no assessments had been made.** Neither does section 9 of Act 30 in question nor any part of the Act mention the Public Property. Indeed, the language employed, referring as it does to the Acts of '58 and '59, is evidently used in relation to private property only. If, then, public property must be taken to be included by the phraseology of the section, it must be for the reason, and none other, that the assessments provided for are to be laid *per superficial foot*, and because this language is obiged to be construed so as to embrace every superficial foot of ground contemplated to be drained. But it has been fully established that public property is not taxable under general statutes providing for taxation; that a political corporation has never been considered to be in view of a tax law, unless expressly designated, and that where the statutes relative to assessments and the collection of taxes contain no reservation in favor of the City, Courts must hold, under universally admitted rules of construction, that the Legislature did not include the same, but intend to speak of taxable property only. The terms, therefore, employed in Section 9 of Act

were
71 ~~was~~ evidently used with the limitations which right reason and experience suggest, and which have been uninterruptedly enforced by judicial interpretation. They can not, it is clear, in the present instance, apply to any other than taxable property in the ordinary signification of that term, and the Public Places of the City of New Orleans are to be considered as not at all covered by them.

What is here observed suffices, it is submitted, to fix nullity on the assessments referred to of the public property of the City of New Orleans in the Third Drainage District.

But the judgments obtained in that district are legally speaking, exactly on the same footing with those in the Fourth Drainage District. In the case of the

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There is no mention at all here of the Act of 61, nor, according to the Supreme Court of Louisiana, in the *Succession of Irwin, 33 La. Annual Rep., p. 93*, any reference thereto.

Drainage District itself. The Court pronounced against the constitutionality of Act 30 of 1871. The title it was held, being "An Act to Provide for the Drainage of New Orleans," could not constitutionally provide for a new drainage district, and still less for the institution of extraordinary proceedings to coerce payment of drainage taxes. Judgment obtained by the summary proceedings in question, in the *Fourth District* were therefore declared to be null and void. Now the Third District being *consimili casu* with the Fourth, the consequence of the decision by the Court must be evidently the nullity of the judgments in both districts.

But Act 57 of 1861 itself, is open to like objections as to constitutionality, with those which the Supreme Court of the

State of Louisiana to opposed Act 30 of 1871. The Act of 1861 was adopted under the domain of the Constitution of Louisiana of 1852. Article 115 of that Constitution required "*that every law enacted by the Legislature shall embrace but one object, and that shall be expressed in the title.*" It was to put a stop to the great abuses of a former time, that Article 115 was adopted. The framers of the Constitution, designed to put an end to a kind of legislation, which was little less than fraud upon the public, and required, that the title given to laws, should fairly apprise the people of the objects in view of the lawgiver, according to the understanding of reasonable men. If the occasion for the constitutional provision, under discussion was considered important, generally speaking, it will be readily perceived, that the necessity for insisting upon it in the case of a statute authorizing summary proceedings, such as Act 57 of 1861, is absolute. This Act gives extraordinary powers, and can therefore admit of none other than a strict construction. In the respect that it substitutes a fictitious or constructive citation, for that which is provided by the general law, and which is the essential foundation for the validity of judicial proceedings, the Act is clearly exceptional in character, and in derogation of common right.

The title to the Act, it is submitted, is in no manner expressive of an authorization to resort to summary proceedings for the levy and collection of the drainage tax, provided for by the previous Acts of 1858 and 1859. The title reads, "An Act *to provide for the collection of the assessments, for draining under the acts of March 18, 1858, and the act supplementary thereto of 1879.*" To collect is to gather, or bring together. Collection signifies the act of collecting; but it means nothing more. It would be perfectly consistent, then, with this phraseology to collect the assessments referred to in the Act simply by ordinary proceedings. This is clear. Indeed, it may be pronounced certain. It is believed to be equally evident that

in providing *for collection* simply, the title to the Act gives no indication whatsoever of any other mode or manner of proceeding. As the mode, as subsequently disclosed by the Act itself, however, instead of being ordinary, is, on the contrary, extraordinary or that by constructive citation, it results unquestionably, that the title gives no notice whatsoever of therealdesign. It follows, if this reasoning be correct, that Act 61 is unconstitutional for repugnancy to Article 115 of the Constitution of the State of Louisiana of 1852, and that all the judgments obtained by summary proceedings thereunder are null and void.

Unconstitutionality of the judgments homologating the drainage assessments in the Fourth Drainage District, and of the judgment homologating the assessments from the second to the tenth instalments in the First Drainage District, obtained as the judgments were in pursuance of Act 30 of 1871, having been already established, it will be seen by the Court, inasmuch as all the remaining judgments purport to have been had in accordance with the provisions of Act 57 of 1861, nullity of the latter judgments is made to appear just as fully as that of the former.

The contention of complainant, regarding the first assessments, is understood to be, that laid under the Acts of 1858, '59, and '61, and remaining uncollected, have actually resulted, in consideration of the language then of Section 9 Act 30 of '71, declaring them validated and exigible, in fixing upon the city the liability for which it must be condemned in the instant suit. The question for discussion here, between the parties before the Court, therefore, is, not whether, under the Act of 1871, there was any obligation imposed upon the city to pay its *pro rata* for the drainage work actually done, on the ground that the city was really owner of certain property within its limits, which had been improved and benefited. The bill of the complainant does not charge this, but that there was an assessment levied against the city, in the time of long ago, and that the identical assessments are

now operative and available for employmentand use, as a fund for the work of 1871? Now the defense of the city is, that there were no lawful assessments whatever resting on the property in question at thetime of the adoption of the Act of 1871, and, if this can be established, it results that there is no liability whatever depending upon or arising out of the assessments. R., p. 5.

A special drainage assessment may be laid upon property by anticipation, if the prospect is a reasonable one, that the work in view is about to be completed, and that there will be a benefit thereby conferred. The tax levied on the assessment, may be collected for the purpose of doing the work, and of rendering benefit to the land involved. But statutes providing for assessments, are to be strictly construed and applied. All formalities laid down by law must be followed, and that there be, as observed, benefit for the property concerned, is indispensable. The principle which underlies the right itself of taxation for local improvements, is, that the territory subject to them shall be benefited by the work and charge in question, and it is not competent to assess for such work in excess of the value so to be superadded, simply because, if that were allowable, the property, to the extent of the difference between the increased value and the cost of the work, would be taken in violation of all right, without adequate compensation. *Cooley on Taxation, 416; Desty on Taxation, Vol. 2, Sec. 237; Draining Co. praying, etc., 11 La. An. R. p. 375.*

It is impossible, consistently with these elementary considerations, to conceive of the maintenance of an assessment upon territory for drainage purposes, after abandonment of the plan itself of drainage. It is equally clear, too, it is believed, if drainage assessments can only be established for drainage purposes, on the theory of benefit to be conferred, either present or future, that upon abolition of the scheme of drainage involved, *the assess-*

*ment is not transferable for another and a distinct purpose of public importance.* Now reference to Act 51 of 1869, of the General Assembly of the State of Louisiana, will show, that the Legislature of the State therein abandoned altogether the drainage scheme of the Acts of '58, '59 and '61, from which complainant would derive claims; that *it expressly repealed all laws and parts of laws creating the drainage districts under these acts;* that it declared, *totidem verbis*, the objects contemplated in the parent act of '58 had not, by reason of inherent defects in that statute, been effectually accomplished, *and that they could not be;* and that the construction of the New Orleans and Ship Island Canal was substituted therefor. Act 51 of 1869 goes even further; it declares, *that the drainage districts have not been protected from overflow, and property of great value has been destroyed and damaged, and the health of the citizens endangered.* The preamble of the act proceeds to declare for *putting an end to the former drainage system*, which it pronounces to be *erroneous in principle and unsuccessful from experience.*

The repeal of the Act of '61, by Act 51 of '69, of itself, it is submitted, disposes of the assessments laid under the Act of '61. The assessments disappear with the Act. But let that pass.

The fifth section of Act 51 directs, that the uncollected taxes assessed upon the land in the former drainage districts, according to the statement filed by the Commissioner of Drainage, *shall be warranted for and paid over to the New Orleans and Ship Island Canal Company*, in order to excavate a portion of their canal, commencing at a point on the Mississippi river and extending to the *Chef Menteur*, in the direction of the *Rigolets*. It is true, it is asserted, in the preamble of Act 51, that the canal will furnish a channel into which the territory of the former drainage districts can be drained. What of that? Let it be supposed that this might or might not be true. Is it not undeniable, that the Act is on its

face, an express relinquishment of the drainage scheme of the earlier time? Is it not apparent that the proposed Canal is its real object, and that the supposed influence upon possible future drainage of New Orleans, is referred to only by way of colorable design to draw to the Canal the drainage assessments? Is it not clear, that the Act itself purports to make of the Canal its principal work, and of the drainage at best, a mere incident? Is it not patent that the Act has for its avowed chief purpose, the construction of the Canal as a commercial adventure, "*to advance the interest of domestic and foreign commerce*," *and that the drainage of New Orleans is not at all the true end of the statute?*

How, let it be asked, can a special assessment for drainage purposes be called upon to pay for a navigation Canal? How can assessments designed merely *for the drainage of swamp lands in certain portions of the parishes of Orleans and Jefferson*, be diverted to a destination which is altogether foreign? What, it may be finally enquired, becomes, if this is allowable, of the principles of the law of special assessments, which are so protective of and so essential to the rights of property?

Act 4 of the Acts of the General Assembly of Louisiana of 1870 is evidently, it is submitted, an Act in pursuance or in consequence of Act 51.

The declarations of the preamble of *Act 51 of 1869*, of the absolute failure of the drainage scheme, are not open to dispute in this case. They are confirmed, if confirmation be demanded, by abundant and uncontradicted testimony in the record. R. pp. 699, 753, and 759.

In *Davidson vs. City of New Orleans*, the Supreme Court of Louisiana gave its sanction to the doctrine which evidently underlies the observations now made. The Court declares it to be supported by text writers, and by a long line of decisions, which pronounce assessments void, *because the benefit to the property can not be seen and traced.*

Says the Court: "In all cases where it was clear that

" the district had received no benefit, the courts have, " without hesitation, interfered on this subject. * *

" The levy is made on the supposition that the estate, " having received the benefit of a public improvement, " ought to relieve the public from its expense. In such a " case, if the owner can have his land taken from him, " for a supposed benefit to the land, which, if the land is " sold for the tax, it is thus conclusively shown he has not " received, and he then be held liable for the deficiency " in the assessment, the injustice, not to say the tyranny, " is manifest." * * * Cooley on Taxation, 471-3.

" If there can be a personal assessment, or the owner " can be made personally liable for the tax thus imposed, " then we have the remarkable result that for a tax which " is imposed on a lot of land upon the theory that its " pecuniary value is increased by the improvement, the " lot may be sold, and if there is a deficiency, the owner " may be required to pay it, or in other words, for the " benefit conferred on the property, the property may be " confiscated, and the owner, for the privilege of having " it confiscated, may be required to pay a tax into the " treasury of the city." *Burroughs on Taxation, p. 475, V., also p. 38, pp. 30, 39, p. 459, pp. 145, 146, 147, pp. 465, 474; 31 Cal, 240, 254; 41 Cal. 525; 49 Cal. 546; 41 N. Y. 123, 126, 133; 36 Mo. 456; 50 Mo. 525; 56 Mo. 286, 356; 58 Penn. 320; 1 Gill. 480; 5 Gilman 416; 59 Maine 80; 3 Bush 416;, 423, 667; 4 Bush 587; 34 Ill. 203; 24 Miss. 467.*

According to the finding of the Circuit Court on the Master's report, in the case before the Court, the City of New Orleans proceeded to retire $1,600,000 of drainage warrants, and gave for them its own absolute 7 per cent fifty year gold bonds. R. p. 787. The City went on to do this under Act 73 of '72; but as has been already shown, this act was only an enabling act, to permit the Municipality to issue bonds of the same tenor as the warrants which were taken up; that

is to say, payable out of the drainage fund, *if that should suffice*. The case, as here regarded then, is clearly that of a trustee, who has by error issued securities for the benefit of the *Cestui que trust*. This conclusion found favor with the Court below, and is sustained by considerations of equity which are too elementary to need development here. Having issued the securities for the advantage of the *Cestuis* estate, it must result inevitably that the City is to be credited with the amount, to the extent of which she has relieved the fund.

If, on the other hand, the General Assembly of Louisiana meant, that the City should issue its own bonds, it then becomes a question of legislative intent, as to how the forced assumption should be considered. The bonds were to be marked "*Drainage Series*," and no other provision was made for retiring or paying them, as already observed, than the drainage fund itself. They were to be issued by the City in its character of *Trustee*, and it follows, it is submitted, *even if they were intended to be absolutely its own*, and to be paid as such, that the design was, necessarily, that they were to be charged against the *drainage fund*, and the City to that extent made creditor of the same. It is not difficult to point out the manner in which the charge so forced upon the City, would have to be regulated and settled. In order to do this, the defendant does not have to look far. The opinion rendered by the court below is again right, and plainly, by force of correct reasoning, sustains itself. By the issue of the bonds then, the City was left a creditor against the drainage fund to the amount of $1,600,000. If, for argument sake, it be considered debtor to the fund to the amount of the assessments on the public streets, and squares in the sum of $700,000, $14.000 for legal services being disallowed, there remains, evidently, a balance in its favor, according to the Court, of nearly $800,000. R. pp. 783-787.

*Story's Eq. Jurisprudence, Sec. 1275. Perry on*

*Trusts, Vol. 2, Sec. 931. Lewin on Trusts, Vol. 1, Marginal Paging 356.*

Best support for the conclusions here given, is to be found in the facts of the case, as they are disclosed in the Record. The Acts of the General Assembly of the State of Louisiana under which the drainage warrants issued, never contemplated that they should become payable, in any event or contingency, otherwise *than out of the drainage fund;* and the corporate authorities of New Orleans were wholly and notoriously without power or competency to bind the municipality to pay, or to provide means for paying, the warrants *except out of that fund.* It has, indeed, at no time been competent for the City under the acts in question, *if they had been correctly interpreted for it*, to incur any liability in respect to the warrants unless to the extent here stated; or to change, it may be added, the character of the liability or obligation evidenced by the warrants, from a charge upon a particular and specific fund, towit, the drainage fund, to a general liability, or obligation of the municipality to be met by general municipal taxation, *or otherwise than out of the particular fund to be derived from the drainage assessments.*

Validated, according to complainant's contention, by the legislation of that trying season, the assessments referred to, would have been sufficient for considerable results; but all resources failed before the demands of the projectors of the drainage scheme. This excited the most extravagant expectations, and was sustained by the most profligate expenditure and waste of public money.

The drainage tax was arbitrarily levied upon each square foot of the district, at a uniform rate, without any regard to the value of the land. The work of draining the alluvial plain on which New Orleans is situated, and worth only 25 cents a cubic yard, was charged against the City, and actually paid for, at fixed rates, four times that amount —50 cents per cubic yard for excavations, and 50 cents for

embankments. R. p. 702. "The Legislature (so the "facts were found by the Court below) selected a con-"tractor and fixed the rate per cubic foot to be paid for "excavations, at within 15 cents of three times the original "estimate for the work, and though the system was less "than two-thirds completed, the amount of excavations in "cubic feet, as determined by the proper authority se-"lected by the Legislature, was double that upon which "the assessments were calculated." (R. p. 86.) According to the testimony of an admitted professional expert, the present City Surveyor, completion of this work, and the building of levees forming part of it, would have cost at the rates allowed, over $2,000,000, and the addition of the interior canals made necessary, $1,000.000 more. R. pp. 701, 709.

This gigantic outlay, was eagerly embarked upon by interested schemers, and speculators, in the period perhaps of most afflicting and general disaster which has appeared in the varied history of New Orleans—when the population did not exceed 200,000, and exhausted by civil war, was prey to faction and the worst civil dissensions. When, tottering from its overgrown proportions, the project of the Canal Company and Van Norden fell at last, the result was general ruin. In the progress of events, *Van Norden* was compelled to sell and transfer the franchises and other property of the Mississippi and Mexican Gulf Ship Canal Company to the City of New Orleans (R., p. 238). In the case of *Marchand et al. vs. Van Norden et al., 33 La. An. R., p. 803*, his title was pronounced to have been acquired by fraudulent transfer from the Company, and Act 30 of '71 was condemned in the case of the *Succession of Irwin, 33 La. An. R.*, by the Supreme Court of Louisiana in unmeasured terms.

One of complainants' witnesses, notwithstanding the premises—a witness who testifies that he loaned for himself and for foreign capitalists represented by him "hundreds of thousands of dollars" on drainage warrants, at

a time when local capitalists rejected them, may be cited to prove the false hopes and mistaken judgment of himself and of his coadventurers. Examined before the Master, this person, in the face of his own experience, said: "It is "just as easy to drain the City of New Orleans today, as "it was to drain with dikes the territory of Holland, "which is after the same plan, and which was drained "forty years ago. I would take a contract today, to do "that work if anybody would help me. It is a very feas- "ible plan—the only plan I know of suitable to the City "of New Orleans. *It is the cheapest plan that could be* "*devised.*" R. p. 512.

The Circuit Court of the United States took a different view from the witness. Said the Court: "The system of "drainage has remained incomplete and has failed, be- "cause it was an unwise and inadequate system, *where* "*every motive springing from human cupidity was against* "*its success, and where provision, originally inadequate,* "*was consumed by extortionate prices established by the* "*Legislature itself.*" R. p. 786.

If a *general* liability of the City for the whole work ever existed, as the complainant contends, it must have originated at a certain date and under a particular law. At *what date*, then, and under *what law*, did this general liability of the City for the whole work come into existence? None of the *Acts prior to 1871* imposed any such liability on the City. Up to that year, New Orleans was only part of a drainage district, which also comprised another parish and city. The drainage work was determined on and executed, and the assessments to pay for it were levied and collected, by subordinate political corporations or agencies, wholly distinct from and independent of the City of New Orleans. *Act 30 of 1871* certainly did not contain any clause or provision to establish the general liability in question. It assumes to take the rolls, with the assessments, and says, that the latter made under the Acts of 58 and 59, and the amendments thereto, are confirmed and

made exigible, and that the collections from them shall constitute a fund for a designated purpose. This, it is obvious, does not purport to provide for the liability in question, or even to look to any such liability. Nor has the complainant even, contended that it did.

Did *Ordinance 814* change the condition of affairs? That is, did it make the City of New Orleans responsible for any greater proportion of the cost of drainage, under the drainage statutes? It evidently did not. The Legislature had regulated the matter of drainage by Act 30 of 1871, and had therein prescribed what work should be done, who should do it, at what rate the work done should be paid for, and from what sources the funds should be derived to pay. After this complete regulation of the s incompetent for the City to adopt a different Moreover, the ordinance did not purport at all to assume the cost of the work as designated by Act 30. It was provided that, if the Drainage Company would work *under the ordinance*, the City would pay in bonds for the work thus done. But the City reserved the right to determine the work to be done, and to stop whenever it was deemed expedient. The ordinance was, therefore, *not* an assumption by the City of the whole, or of any part, of the work *under the legislative scheme*, but was an expressed and distinct repudiation of the whole of that scheme, and a proposal that, in lieu of it, the contracting company should do only such work as the City desired and be paid in the manner proposed by it. Even to this extent the ordinance was void. If the ordinance had been legal and valid, it would have substituted for the legislative scheme a lesser scheme of the City's own devising, of indeterminate extent, with no fixed contractor or rate of compensation, and subject to be terminated by the City at any moment. Not only did this substituted City Council scheme not profess to be connected with, or subsidiary to the legislative scheme, but the ordinance, both in its preamble and concluding section, denounced Act 30 as un-

constitutional and invalid, and as an illegal usurpation by the Legislature of the City's proper municipal rights. And it further warned the Drainage, Company that *action under the ordinance* shall not be considered *as action under the statute*, or as in any manner *implying the City's recognition of the validity of the statute*.

Even then, had Ordinance 814 been valid, still, as its declared object was to repudiate and refuse to have anything to do with Act 30, it certainly did not design to assume the whole or any of the indebtedness for drainage under that Act.

When, therefore, *Act 73 of 1872* was passed, there was no *law* which made the City of New Orleans liable for any part of the cost of drainage, unless it be assumed to be, according to complainant's delusive theory, Act 30 of 1871, for the extent of the socalled assessments against the City. The only *ordinance* on the subject passed by the City, as has been seen, was one which, so far from approving and assuming the cost of the legislative scheme, denounced that scheme as unconstitutional, illegal, and void, and declared that the City would do, not the work as designated in the Statute, but only such as she herself approved, contract with whom she pleased, and stop when she liked.

Now, did Act 73 of 1872 go to make out of the *drainage* scheme a general liability for the City of New Orleans or anything at all like one? The answer to this question has been already supplied. This statute has, it is believed, been sufficiently discussed. It has been well established, it is submitted that, considered in itself alone, and without reference to *Ordinance 814*, the Act merely purports to permit funding, by the City of New Orleans, of the *drainage* warrants, into bonds of a "*Drainage Series*," to be conditionally payable only out of *drainage funds*.

Nor can Act 73 be considered as a ratification of Ordinance 814. For that ordinance is not mentioned in the Act, nor is there any proof that it was known to the Legislature,

or considered by it. Besides, how could the Legislature *ratify an ordinance* whose sole object was to declare Act 30 of 1871 illegal and unconstitutional, and to substitute a wholly different scheme of drainage? If this ordinance had been ratified, the Legislature would have thereby acquiesced in the assertion of the City, that Act 30 was illegal and void, and would have assented to the claim of the latter, to determine and control the work, and to contract with others than the Draining Company, and to stop work whenever the City thought fit. To conclude, in this immediate connection, is it likely that the Legislature would have ratified such an attack on the legality of its action of the previous session, or that the Drainage Company would have procured a ratification so destructive of its rights?

Complainant's argument that the City of New Orleans *is estopped* to show the true condition of its relations with the drainage fund is, under the views of the case which have been expressed, very clearly not available. He has sued the city in equity, *as trustee of the drainage assessments*. Having so sued, and having charged the City with wasting and misappropriating the *drainage fund*, the latter is evidently not to be denied the opportunity to establish what has been done in good faith by it, in administering the fund, and to charge the same accordingly. The bill prays, that the City be decreed to account for all sums collected by it in the course of its trust, or that should have been collected, or that it could have collected under the Acts of '58, '59, '61, and '71, and, as the bill itself reads, for "*all payments, disbursements, and dispositions*" thereof (R. p. 181). It is, therefore, submitted, that it is evi dently not competent, in the presence of such a demand, to refuse to permit the City the opportunity, duly to credit as well as to charge itself.

The City, *as trustee*, has secured to it, according to familiar principles of equity jurisprudence, the right to be reimbursed all expenses which it has incurred in the execution of the trust confided to it, and

among them, those required for the employment of the assistance proper and necessary for the execution of the trust. Again, the City is also entitled, while acting in the fiduciary character belonging to it, if an overpayment has been by it made, whether by mistake or error, to recoup itself, and to charge the fund accordingly. But how can this or any like equitable proceeding be applied, unless the City is allowed, to establish the fact and the nature of the overpayment or error which may be in question? *He who seeks equity, must do equity.* Equity has jurisdiction in such matters as are here referred to, not only where there are mutual accounts, but also where the accounts to be rendered, are on one side only. How is that jurisdiction to be enforced, if the very scrutiny which it presupposes, can be practically declined. The charge of the complainant is, and it has been repeated over and over again, *that no account at all has been rendered, and especially that one is now withheld from him.* When the City comes into court and proposes to state and make good its administration, complainant can not thus obstruct the way. He can not deny equity to the defendant trustee, while invoking it for himself. His attitude would, in that event, be an impossible one. Just what it would amount to, is here exhibited. He would be in he condition of an *Actor* who impleads the *Reus* for alleged misappropriation and waste in a fiduciary relation, but who virtually denies the latter the benefits which are resultant from the nature of the relation involved. *A Court of Equity rejects estoppels and pursues the actual truth where it finds it, and will determine and decree according to the verity and justice of the fact.*

*Perry on Trusts, Vol. 1, § 417. Lewin on Trusts, Vol. 1, Text. Bank Series from 8th Eng. Ed., p. 265.*

It stands to reason that the complainant must be consistent with himself. He can not sue the city for its gestion as a *trustee*, and have judgment against it, as in case of an ordinary debtor, personally bound on an individual undertaking.

Here is not at all a question as to whether or not a person, who is authorized to admit a liability, is *estopped* by an admission of the same, but, on the contrary, whether, in the circumstances, the liability sought to be enforced, is at all equitable and possible even. Where it is not competent for the city of New Orleans to impose a liability upon itself, it is perfectly clear that there can be no *estoppel*.

*Municipality No. 2 vs. New Orleans Cotton Press, 18 La. R., p. 24. Millandon vs. 1st Municipality of New Orleans, 1 An. R. 215. Delabigaire vs. 2d Municipality, 3 La. An. R. 235. Brown vs. Police Jury of Madison, 4 An. 189. Marchand vs. Noyes et al., 33 La. An. R. 884. Marsh vs. Fulton, 10 Wall. R. p. 683-684. Thomas vs. Richmond, 12 Wall. R. p. 354. Bigelow on Estoppel, Sixth Ed., p. 530. Dillon on Municipal Corporation, Vol. 1, p. 457. South Ottowa vs. Perkins, 94 U. S., p. 261. Antony vs. County Jasper, 101 U. S. 607. Northern Bank of Toledo vs. Porter Township Trustees, 110 U. S., p. 612.* (Exhibit P)

II.

*The misappropriations with which the City is charged, even if proved, are more than accounted for by the credits to which it is entitled.*

The misappropriations with which the City is charged are the following, viz:

| | | |
|---|---|---|
| 1. Various sums, Account No. 1 | $ 18,699 | 66 |
| 2. Paid J. O'Hara, January, 1874 | 3,000 | 00 |
| 3. Paid E. P. Boyer, January, 1874 | 500 | 00 |
| 4. Collected as attorney's fees in Third Drainage District | 7,502 | 57 |
| 5. Paid Lacey, fees in First Drainage District. | 1,000 | 00 |
| 6. Collections not placed to credit of fund | 6,884 | 83 |
| 7. Expenses of Drainage Bureau (as shown by defendant's exhibit) | 52,006 | 65 |
| 8. Collections in Drainage Warrants | 215,862 | 97 |
| Total of claimed misappropriations | $298,706 | 68 |

R. p. 10, 11.

The sum total of these alleged misappropriations is, according to complainant's own figures, considerably less than half the amount of the overpayment by the City into the Drainage Fund. The assessments sought to be charged against the City being somewhat less than $700,000, it took up with bonds over $1,375,000 of Drainage Warrants. The surplus to the credit of the City, as trustee of the fund was thus over $675,000.

That the City is entitled to charge the fund with what it may have erroneously paid into it, sufficiently appears from what has already been said. Where the City has overpaid, the error has necessarily enriched the trust fund, without prejudice of any kind to the equitable owners thereof. *How, then, can the latter now exact from the City, the whole of what it paid out through error to persons not entitled, and yet refuse credit for what has been paid in through error, to the persons who were entitled?* It is inequitable as well as unjust, to charge the City with the amount it erroneously disbursed from the trust fund, and yet not credit with the amount it erroneously paid into the fund. The maxim that he who seeks equity must do equity, must be again invoked here.

The two largest items of the alleged misappropriations are clearly untenable.

*First.* The costs and expenses of the Drainage Bureau, $52,000. These expenses were incurred in good faith by the City, in the attempt to collect the outstanding assessments. The scheme adopted, was approved by Van Norden, and stipulated by him in the interest of those who had acquired the warrants from him, as well as in his own interest. At the time of the transfer, he received warrants of the face value of $320,000. To the extent of these warrants, he and his assignees are certainly bound. His personal interest in the adoption of the best and speediest mode of collection, of the outstanding assessments, was thus very large. His experience of the difficulties in making such collections, was certainly great. Actuated

by this interest, and guided by this experience, he selected two of his most trusted employes, and induced the City to commit collections to them. That he did not consider that the remuneration of these employes, was extravagant is certain; for, if it had been, then he would have been the principal sufferer, as he owned nearly half of the outstanding warrants. The scheme adopted, was undoubtedly considered by the parties mainly interested, as the best and most practicable one they could devise. Their knowledge of the facts and circumstances, under which the collection had to be made, and to which the scheme was adapted, was incomparably fuller and more accurate than any which is now attainable; and Van Norden himself was stimulated by a personal interest, very much more decided than appears in anybody else concerned in these transactions. This is the scheme of collection, which the Court is now asked to pronounce imprudent and wasteful. It is to be observed, however, that complainant has neither shown nor alleged, that a better and more economical scheme could have been adopted. Nor, indeed, has it been indicated, it is submitted, in what respect the scheme adopted was defective or obnoxious to just criticism. Van Norden's motive in stipulating the number and compensation of the employes, who were to compose the Drainage Bureau, was obviously to prevent the City from appointing *more* clerks than was necessary and paying them a *larger compensation* than was proper. If the plan eventually proved unsuccessful, the Court will see, *it was at least the very best which the parties most interested at the time could contrive* (R., pp. 248 to 254). Testimony of James B. Guthrie, 630-663, *et seq.*

A trustee is allowed, out of the trust fund, all costs and expenses incurred in protecting or collecting the trust estate.

> "Trustees have an inherent equitable right to be *reimbursed all expenses* which they reasonably and properly incur in the execution of the trust, and *it is immaterial*

*that there are no provisions* for such expenses in the instrument of trust." *Perry on Trusts, Vol. II,* § *910.*

"A trustee *may employ necessary assistants* in executing the trust and pay them; thus he may *employ agents, collectors, accountants,* and other persons properly employed in similar affairs." *Id.* § *912.*

The *gravamen* of this suit is the charge against the City of New Orleans as a *trustee.* Being a *trustee* the City not only had the right to incur expense chargeable against the trust fund in collecting it, but it was clearly its duty to spare no reasonable expense whereby it could insure such collection. In discharge of this part, the City adopted, what it deemed the best mode of collecting, and this was fully approved and acquiesced in by the principal beneficiary of the fund. Although the constitution of the trust, did not impose the costs of collection on the City, the complainant now asks, that the latter should be condemned to pay them. But in its character of trustee, the City is necessarily not chargeable with these costs, unless it is proven to have acted with gross negligence. No evidence, at all to that effect has been administered. Nor has it even been attempted to be shown, that a better plan could have been adopted. The costs are, therefore, properly chargeable against the trust fund, even though the plan did not realize the hopes and expectations entertained when it was adopted. The decision of the Circuit Court, gave special consideration to the charges made by the City, in that portion of the administration of the drainage fund referred to just here.

The Court said, in giving its opinion: "There are sev-
"eral charges, amounting to about $100,000, which it is
"urged, the City illegally allowed, and paid out of the
"fund. * * * That for the clerks selected by Van
"Norden was imposed by the very act of transfer to the
"City, was publicly recorded, and was as well known and
"as subject to opposition in the Courts, by the warrant

"holders as to resistance from the City, and was in good "faith intended for the benefit of the fund." R. p. 782.

*Second. As to the Drainage Taxes paid in Warrants, $215,000.* The facts in regard to this item of alleged misappropriations are as follows: The City authorized debtors of drainage assessments to pay them in drainage warrants. Now these warrants could be procured, only by purchase from Van Norden. The assessees, who wished to pay in warrants, were, therefore, compelled to buy from him. When Van Norden sold his warrants, these were in reality paid, and were paid by debtors of the drainage tax. Suppose, for example, that A owed a drainage assessment of $50, and Van Norden owned a drainage warrant for the same sum. A might pay his assessment to the City and the City would then take up and cancel the warrant, or he might buy the warrant direct from Van Norden and pay it into the City. In either case the same result would have ensued: A's tax would have been paid, and Van Norden's warrant would have been paid. It clearly results, therefore, that it made no difference at all to Van Norden who paid him for his warrant; he was just as well paid when he received A's money direct from A himself, as he was when he happened to receive it through the City. There would have been no wrong to Van Norden, or injury to the drainage fund, had the whole of the assessments been collected in this way. The permission to pay the assessments in warrants, evidently opened for Van Norden an extensive market for the same. That he largely availed himself of it, is shown by the amount of assessments thus actually paid.

Now, how can Van Norden, or his transferee, after participating in and benefiting by this mode of paying the assessments, be heard to complain that he was injured thereby? It is very plain, that he was not injured. Mr. Guthrie testifies, that Van Norden approved this plan, because it enabled him to sell his warrants for cash.

Having approved of this mode of dealing with the trust fund, of which he was then sole beneficiary, and having derived a large benefit thereby, he is, it is submitted, *estopped* from now claiming that such payments were illegal and injurious to him. His assignees are necessarily equally estopped. It can not be objected, that such mode of paying the assessments, enabled some of the warrant holders to obtain an unfair preference over others. The City treated all the warrants as owned by Van Norden, whose assignees were, legally speaking, himself. The City did not, therefore, have to prorate the taxes as collected. She simply paid the first warrant presented. It is, therefore, impossible to see how any one was injured by this payment of assessments in warrants, which was nothing more than a direct collection of the trust fund by the beneficiary himself instead of a collection through the City.

Deducting these two items of expenses ($52,000), and assessments paid in warrants ($215,000) from the total ($298,000) of misappropriations as charged, there remains only about $30,000 to account for; and $20,000 of this was accounted for in the transfer to the City by Van Norden on June 6, 1876. R. p. 248 to 254. At that time, the City admitted having used $20,000 of drainage collections, and issued to Van Norden, drainage warrants to that amount in satisfaction. The matter having been thus settled between the City and Van Norden, who was then the party entitled to the sum so misapplied, the City can not be charged a second time with the same sum. Thus the sum total of money collected for the drainage fund, and not fully accounted for, is about $10,000. *And against this the City can point to the enormous sum of at least $675,000 erroneously paid into the fund.*

The alleged misappropriations are, therefore, not only accounted for on any view taken of the case, but in reality, upon examination, appear to be altogether insignificant.

III.

*The City has used due diligence as trustee to collect the assessments.*

The plaintiff complains that the City has been remiss and negligent in enforcing collections. The City avers that she has used all the diligence in this respect which could be required of her.

The best evidence as to the character of the City's efforts to collect the tax is that given by Van Norden in 1875, when he was still sole beneficiary of the fund. *In State of Louisiana ex rel. Warner Van Norden vs. Mayor and Board of Administrators of the City of New Orleans*, being the suit to compel the City to issue *fi. fas.* to enforce the collection of the drainage assessments, the relator testified as follows, R. pp. 331, 332:

> Q.—When did the City of New Orleans commence to undertake the collection of the drainage tax under the drainage tax judgment?
>
> A.—So far as I know, in 1871.
>
> Q.—Had she, during that time, a bureau for that purpose?
>
> A.—Yes, sir.
>
> Q.—Who was at the head of it?
>
> A.—W. T. Mayo.
>
> Q.—Do you know what special duty was assigned to that office?
>
> A.—The collection of the drainage tax.
>
> Q.—Do you know whether *he was diligent* in his efforts to collect this tax?
>
> A.—*Yes, sir; very diligent.*

Van Norden then went on to tell of his own efforts to assist the City in the collection.

> Q.—Have *you* made any efforts to collect the drainage tax?
>
> A.—The City agreed to receive warrants issued to me in payment of the drainage tax. *I set young men to work to solicit the collecting of the taxes*, offering them a

liberal discount. But so far we have only succeeded in collecting $25,000 in warrants up to the present time. We told them if they didn't pay, they would be compelled to.

Q.—*Did your employes make strenuous efforts to realize the collections?*

A.—Yes, sir. (R. p. 332.)

This testimony was given Feb. 8, 1875. It proves that down to that time the City had, in Van Norden's opinion, used due diligence, and had been energetically assisted by himself to collect the assessments. The chief of the City's bureau had been, Van Norden says, *very diligent*, and his own clerks had used *strenuous efforts*. R. p. 332.

Evidently Van Norden at that time thought that he and the City had used every possible means, except the writs of *fi. fa.* to enforce collections. He desired that this means also should be tried. The City objected, as in her opinion the issuance of the writs would involve a great expense and be productive of no results. The Courts, however, decided that the City was bound to issue the writs if Van Norden desired it. R. p. 323, 336. The City at once, and in the best faith, complied with the mandate of the Court. Mr. Guthrie, who had represented Van Norden in his auxiliary efforts to collect the assessments, and who was thoroughly familiar with the rolls and the property, was requested to aid the City Attorney. He did so, and pointed out the property against which the largest assessments were outstanding and which from their value, situation, etc., were most likely to bring a return. R. p. 630. Some 1,571 writs were issued in all. R. pp. 617-618. The net result to the fund was, as we have seen, almost nothing. Van Norden himself evidently acquiesced in the abandonment of this procedure. The results were entirely inadequate to the outlay of time and money.

The efforts of the City to collect have also been frustrated by two decisions of the Supreme Court of the State of Louisiana. The first was the decision in the *Succes-*

*sion of Patrick Irwin, 33 La. An. Reports, p. 63.* The Court held, that judgments obtained by summary proceeding provided for in Act 30 of the Legislature of Louisiana of 1871, were null and void. The result of the decision was, as has been seen, *the nullity of the homologation of the tableau for the entire Fourth Drainage District.* This judgment left the City without any adequate means of enforcing any collections in that district. Not only was it made impracticable for the City to collect the assessments by writs of *fieri facias*, but the rolls themselves did not import a mortgage, so that the City could not collect at sales.

The other decision was in the case of *Davidson vs. City, 34 La. An. Reports, 176,* where it was held by the Court *that a judgment for a drainage tax will not be enforced where it is shown that the property received no benefit from the drainage.*

The result of the decision *in Davidson vs. City* was, as has been shown, to release from any liability for the assessment more than half of the First and Third Drainage Districts, and almost the whole of the Second. The evidence in the instant suit shows that all the land between Metairie Ridge and Lake Pontchartrain is an uninhabitable morass, lower than average high tide in Lake Pontchartrain. The land has absolutely no value. *Along the Metairie Ridge is higher, but so far from being benefited it has been injured by the drainage canal opened on the lower side of the City. This canal has exposed these lands to overflow from the Lake.* R., pp. 698-9.

The testimony of the deputy tax collectors proves that for years it has been impossible to collect taxes on a large area between the Metairie Ridge and the river. R., pp. 753, 754, 760.

Mr. Guthrie testifies to the great diligence of the City in endeavoring to make the collections at the head of a corps of clerks. A personal canvass of the City was made by this witness, in order to find those parties who appeared to

owe drainage taxes, and wherever found every effort was made to secure payment of the same. R., p. 742.

It may be noted here that the plaintiff has not shown what else the City could have done, besides what she has actually attempted. It may be easy to charge a trustee in general terms with negligence and remissness; but the complainant's success must depend, not on the charges so made, but on the evidence by which they are supported.

IV.

*As to the alleged duty of the City to complete the Drainage Scheme from the point at which it was left by Van Norden in 1876.*

It has been indicated on testimony duly referred to, that the completion of Bell's scheme as projected by him, would have cost, at the rates allowed by Act 30 of 1871, over $2,000,000. Assuming that this rate was just three times larger than it should have been, the completion would still have cost nearly or quite $700,000; and, when completed, none of the lands back of the Metairie Ridge would have been benefited. To accomplish the drainage of these lands, a large number of interior canals would have been required. These canals would have cost, according to the expert testimony, probably $1,000,000 more. R. pp. 697-98.

If they had not been dry, the lands north of the Metairie Ridge would have been as valueless after the completion of the scheme on which Van Norden was working as they were before it was begun. In the Second Drainage District the same remark applies. Had all the work mapped out for Van Norden been finished, and no interior canals added, it is well established the condition of the lands would not have been improved. R. pp. 700.

Now, the assessments on the lands whose value would not have been increased by the completion of Van Norden's works, amount probably to about $500,000. The entire amount remaining on the rolls did not exceed $750,000;

so that the City had, to complete the work, a fund not exceeding $250,000, and the completion would have cost, say, three times that sum. The assessments would thus have been more than exhausted in completing the work, and the outstanding warrants would have remained unpaid. If, then, the work was to be completed out of the assessments, there was not enough of them left for that purpose. If the work had been done, the assessments would have been exhausted by it. How, then, are the present holders injured by the non-completion of the work ?

Besides, the constitutional amendment had prohibited the City from increasing its debt, and it was certain that the City could not have completed the work without increasing its debt. Long before the permission granted by Act 16 of 1876 had been acted on, by the City or by Van Norden, the rate of taxation of the city of New Orleans had been limited to 1½ per cent. When the transfer was made, it was made subject to the limitation then existing. The rate thus limited was much smaller than that which the City had levied for several years prior to that time. It was certain, therefore, that the whole of the limited rate would be taken up for other purposes and nothing left for drainage works.

It is urged that the contract of the Mississippi and Mexican Gulf Ship Canal Company under Act No. 30 of 1871, out of which the drainage warrants arose, could not be impaired by the constitutional amendment. This might be conceded without help to the complainant. The contract at best, as the argument has shown, stipulated only for the issue of warrants against the drainage fund and this the constitutional amendment of 1874 permits. *The prohibition contained in the amendment is against an increase by the City of its own debt.* The provision of the amendment was to increase, as was desirable and proper, the debt of the drainage fund. R. p. 784. The warrants involved inthe present litigation being, on their face and in express terms,

payable only from the drainage fund, and having all been issued on work not paid for subsequent to the amendment, the original and subsequent receivers of the warrants, took them with the inhibition of the constitution stamped upon them, and they can not, either by the orders of the city officials or in any other way, be permitted to increase the City's own debt. So it was expressly ruled by the Circuit Court and the judgment of that Court, it is submitted, ought to be now affirmed.

The complainants, in charging impairment of the contract, by them invoked, can not be permitted, it is submitted, in conclusion to assail and destroy the integrity thereof by demanding over and above that which may have been covenanted. "Payment of these warrants" (says the Supreme Court of Louisiana, in *Davidson vs. City of New Orleans, 34 La. An. R. p. 177*, in speaking of drainage warrants like those proceeded upon in the present litigation) "is therefore to be regulated by the provisions of the "authority under which they were issued, *and that author-* "*ity expressly confines it exclusively to a special fund,* "*when realized*, AND IF REALIZED."

Respectfully submitted,

CARLETON HUNT,

*City Attorney of New Orleans.*

# APPENDIX.

## EXHIBITS

Referred to in the Foregoing Brief.

## EXHIBIT A.

[Act 165 of the Acts of 1858.]

AN ACT to provide for leveeing, draining, and reclaiming swamp lands in certain portions of the parishes of Orleans and Jefferson.

Section 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana, in General Assembly convened*, That, for the purposes of this act, all that portion of the parish of Orleans lying and being within the following limits, viz.: Beginning at the Mississippi river at Julia street, following said street to the canal of the New Orleans Canal and Banking Company, following said canal as far as Lake Pontchartrain, along said lake to the Bayou St. John, following said bayou to the Canal Carondelet, along said canal to St. Peter street, along St. Peter street to the river, following the banks of the river to the starting point, shall constitute the *First Draining District*. That the following portions of the parishes of Orleans and Jefferson, viz.: Beginning at the Mississippi river, at the upper side of Julia street, along Julia street to Mobile Landing, along said landing to Delord street, along Delord street and the upper side of the canal of the New Orleans Canal and Banking Company, following said canal to Lake Pontchartrain, along the shores of said lake to the Jefferson and Pontchartrain railroad, following said road to the river Mississippi, and following the banks of said river to the starting point, shall constitute the *Second Leveeing and Draining District*. And all that portion of the parish of Orleans lying and being within the following limits, viz.: From the river Mississippi at St. Peter street, along the lower side of said street to Canal Carondelet, following said canal to Bayou St. John, along said bayou to Lake Pontchartrain, along the shores of said lake to Lafayette avenue, following said avenue to the river Mississippi, along

the banks of said river to the starting point, shall constitute the *Third Leveeing and Draining District*.

Sec. 2. *Be it further enacted, etc.*, That, for the purpose of carrying into effect the provisions of this act, there shall be three Boards of Commissioners, to be appointed and organized as follows: one to be designated and known as the Board of Commissioners of the First Draining District, one as the Board of Commissioners of the Second Draining District, one as the Board of Commissioners of the Third Draining District. Each board of commissioners shall be composed of five persons, residents of the district for which they are appointed. The boards of commissioners of the First and Third Draining Districts shall be appointed by the Mayor of the City of New Orleans, by and with the advice and consent of the board of aldermen of said city; and the board of commissioners of the Second Draining District shall be composed of five persons, residents of the said district, to be appointed as follows, viz.: two by the Mayor of the City of New Orleans, by and with the advice and consent of the board of aldermen of the city, one by the council of the city of Jefferson, one by the police jury of the parish of Jefferson, and one by the council of the town of Carrollton. Said commissioners shall serve for the term of four years; and no member of the common council of the City of New Orleans, of the police jury of the parish of Jefferson, or of the councils of the City of Jefferson and town of Carrollton, shall, during the term for which they shall have been elected, be eligible as commissioners in either of the districts aforesaid.

Sec. 3. *Be it further enacted, etc.*, That at the first meeting of the Boards of Commissioners of the First and Third Draining Districts, the said boards shall be divided by lot into two classes. The seats of the first class shall be vacated at the end of two years; the seats of the second class shall be vacated at the end of four

years; *Provided*, That three members shall constitute the first class, and two members shall constitute the second class, and that every two years thereafter the Mayor, as aforesaid, shall appoint, as hereinafter provided, commissioners to fill the vacancies in each board whose terms may have expired; and in case of vacancy by death, resignation, or otherwise, the Mayor shall appoint, in the same manner as hereinafter provided, commissioners to fill the vacancies of the unexpired term: it being understood that the Board of Commissioners for the Second Draining District shall serve for the full term of four years, and in case of vacancy by death, resignation, or otherwise, in said board, such vacancy shall be filled by the authority making the original appointment.

Sec. 4. *Be it further enacted, etc.*, That the said boards of commissioners are hereby invested with all the rights and powers necessary to thoroughly drain the several draining districts, as expressed in the first section of this act, and to that end shall have the right, at all times, of entering on the lands within the limits of the districts aforesaid, and of placing thereon their engines and machinery, and of freely passing over and using the same, and of digging all necessary canals and drains, making all necessary embankments and levees, and of doing all things lawful to be done, which may be useful or necessary in draining, cleaning and reclaiming the land within said districts. Said boards of commissioners are authorized to cut their canals and drains through the streets and squares, and in the event of any street selected for the location of a canal being too narrow for a draining canal and a public highway, the said boards of commissioners may cause such streets to be widened; *Provided, however*, That any person or corporation shall have the right, by petition addressed to any court of competent jurisdiction, to oppose any acts of the boards in the exercise of the powers conferred by this section on said boards, and it shall be the duty of such court summarily to hear and

determine the same, after a full hearing of both parties, and such court shall limit the action of the boards to the exercise of the powers herein conferred, in carrying into effect the provisions of this act, according to its true intent and meaning, and where the same can not be done without injury or loss to the complainant, said court shall award adequate compensation; *And provided also*, That on appeal to the Supreme Court, the trial of the same shall have priority and preference over all other cases therein, and on such appeals the said Boards shall only be required to give security for costs of appeal; *And provided further*, That in any such suit nothing herein contained shall prevent said Boards from recovering judgment against any such complainant or complainants for damages, where it can be shown that such have been incurred, and that such suit or suits were brought on frivolous grounds or from improper motive.

Sec. 5. *Be it further enacted, etc.*, That said Boards shall each have the right to sue and be sued, to contract for works necessary to be done, under this act, to have a seal and to alter the same, to accept and receive any gift, legacy, or donation that may be made or left in their favor, and generally to do all that may be convenient or necessary for the performance of the duties which are imposed upon them, or that may be requisite for the welfare or success of the plan of operations which are confined to them by this act, but not beyond the powers herein conferred.

Sec. 6. *Be it further enacted, etc.*, That the domicile of the said Boards of Commissioners shall be located in the city of New Orleans; each Board shall organize within fifteen days after their appointment, or as soon thereafter as practicable, and shall appoint one of their number as President, on whom legal service of all process or citation against such board shall be made. Each board of Commissioners is hereby empowered and authorized to appoint such officers, and to make such bylaws, rules, and regulations for their own

government, as they may see fit, and from time to time to change the same, under such restrictions as they may think proper to impose.

Sec. 7. *Be it further enacted, etc.*, That said Board of Commissioners shall have the right to proceed, and are hereby empowered to levee, drain, and reclaim the lands embraced within their respective draining sections or districts, as established by this Act, in the following manner: Whenever either of said Boards of Commissioners is prepared to drain their respective sections or districts, such Boards of Commissioners shall cause a plan thereof to be made, accurately designating the limits of the section or district to be drained as far as possible, the subdivision of the property therein contained, *and the names of the proprietors*, as also the dimensions and directions of the canals intended to be dug, and the place where the steam engines will be established. Such plan or plans shall be deposited in the office of the Recorder of Mortgages of the parish in which the section or district to be drained is situate, and notices shall be inserted, in the French and English, in two newspapers published in said City of New Orleans, at least once a week during four weeks in succession, announcing that such Board of Commissioners will proceed to drain such section, describing the place where the plan thereof is deposited, accurately defining the limits thereof, and indicating as nearly as possible the time within which the draining thereof will be completed, and the probable cost of said works. After such publications, such Board of Commissioners shall apply, by petition, to one of the district courts in the parish of Orleans for that portion of the section or district lying within the limits of said parish, and to the District Court in the parish of Jefferson for that portion of the section or district lying within said parish; which court or courts, upon due proof being made of the publications of said notices aforesaid, *shall decree that each portion of the property situated within the said limits*

*is subject to a first mortgage, lien, and privilege in favor of such Board of Commissioners for such amount as may be assessed upon such property for its proportion* of the costs of draining such section or district, and interest thereon at 6 per centum per annum from demand thereof. The decree of the District Court in the parish of Orleans shall be recorded in the office of the Recorder of Mortgages in and for said parish, and the decree of the District Court of the parish of Jefferson shall be recorded in the office of the Parish Recorder of said parish, and a certified copy of the aforesaid plan or plans shall also be deposited in each of said offices for the information of said recorders. Said recorders shall be entitled to twenty dollars each for the recording of the said decree and the deposit of said plan or plans; and, in case they be required by said Board of Commissioners to record the said decree in the name of any or all of the proprietors of real property within said section or district, they shall be entitled to receive 50 cents for such special recording; and whenever the said recorders, or either of them, may be required to deliver a certificate of mortgages on any real property embraced within said draining section or district, such recorder shall mention therein that such property is subject to a lien, privilege, and first mortgage in favor of the Board of Commissioners of the section or district in which such property is situate, for such sum of money as may be assessed on such property for the draining thereof; said lien, privilege, and first mortgage shall take precedence over all mortgages, liens, and privileges whatsoever, whether tacit, conventional, legal, or judicial, and shall attach to said property until the amount assessed and the interest thereon shall have been paid in full.

Sec. 8. *Be it further enacted, etc.*, That said Boards of Commissioners, each within its own section or district, shall have the right and are hereby authorized and empowered to levy such uniform assessment or assessments upon

the superficial or square foot of lands situate within the draining section or district of such board, to defray the construction of the levees, machinery, canals, and other works necessary for the purpose of carrying out the provisions of this Act as applicable to its particular district, which shall be collected, from time to time, as the wants of such Board or Boards of Commissioners may require; *Provided, however*, That the same shall not, in the aggregate, for any one district, exceed the sum of three hundred and fifty thousand dollars; *And provided further*, That not more than one-half of said amount shall be demandable within two years after the passage of this act.

Sec. 9. *Be it further enacted, etc.*, That on non-payment of the amount of the assessment, judgment therefor shall be recoverable before any court of competent jurisdiction, and the land so assessed shall be sold according to law, and each board are hereby authorized to purchase the same, and shall hold or dispose of the same for the benefit of such drainage district; *Provided*, That the sale thereof shall be made at public auction after thirty days' notice by three advertisements in some newspaper published in such district; *And provided further*, That the price of such sale shall fully cover the amount of the judgment with all costs and interests up to the time of purchase by such draining board with 6 per cent per annum interest upon the aggregate so formed from that time until its alienation by the board, and if, while the property of the draining district, such property would have become liable for any further assessment, the sale shall also cover the amount thereof.

Sec. 10. *Be it further enacted, etc.*, That no compensation shall be allowed to said commissioners for their services, but they shall have the right to appoint and employ such officers and employes as they may deem proper, and fix their salaries or compensations; and said commissioners shall make annual reports of all their operations

under this act to the Common Council of the city of New Orleans, and as often as required so to do by said Council.

Sec. 11. *Be it further enacted, etc.*, That the sum of eighty-one thousand dollars be and the same is hereby appropriated out of the Swamp Land Fund of the First Swamp Land District of this state, to aid in carrying out the object of this act. The sum so appropriated shall be equally divided among the said draining sections or districts, as fixed by this act, and in proportion to the area of each district to be drained.

Sec. 12. *Be it further enacted, etc.*, That the Legislature reserve the right of repealing, altering, changing, or modifying this act.

Sec. 13. *Be it further enacted, etc.*, That this act shall take effect and be in full force from and after its passage, and that all laws or parts of laws contrary to or in any wise conflicting with the provisions of this act be and the same are hereby repealed.

WM. W. PUGH,
*Speaker of the House of Representatives.*

C. H. MOUTON,
*Lieutenant-Governor and President of the Senate.*

Approved March 18, 1858.

ROBT. C. WICKLIFFE,
*Governor of the State of Louisiana.*

A true copy.

ANDREW S. HERRON,
*Secretary of State.*

## EXHIBIT B.

[Act 191 of the Acts of 1859.]

AN ACT supplementary to an act entitled "An Act to provide for leveeing, draining, and reclaiming swamp lands in certain portions of the parishes of Orleans and Jefferson," approved March the eighteenth, eighteen hundred and fifty-eight.

Section 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana, in General Assembly convened*, That in order to enable the several Boards of Commissioners created under and by virtue of the act entitled "An Act to provide for leveeing, draining, and reclaiming swamp lands in certain portions of the parishes of Orleans and Jefferson," approved March the eighteenth, eighteen hundred and fifty eight, to carry into effect and to commence immediately the works therein contemplated, each of said Boards of Commissioners be and are hereby authorized and empowered to issue bonds of the sum of five hundred dollars each, having not more than thirty years to run, and bearing interest not exceeding eight per cent per annum; the said bonds shall be designated as "Draining Bonds," and shall be signed by the President and countersigned by the Secretary of the Board of Commissioners issuing them; *Provided*, That the total amount of bonds so issued shall not, for any one draining section or district, exceed the sum of three hundred and fifty thousand dollars.

Sec. 2. *Be it further enacted, etc.*, That it shall be the duty of the Boards of Commissioners aforesaid, upon issuing draining bonds as authorized by the first section of this act, to fix and determine the amount of assessment to be levied upon the superficial or square foot of land situated within the draining district or section of such board or boards, in conformity with the provisions of the afore recited act,

entitled "An Act to provide for leveeing, draining and reclaiming swamp lands in certain portions of the parishes of Orleans and Jefferson," approved March 18, 1858, and fix and apportion the amount to be paid yearly, by the owner or owners of said lands, in order to pay the annual interest on said bonds, and such bonds as may mature; *Provided*, That the amount of assessment demandable and collectable yearly shall not exceed in the aggregate more than one-tenth of such assessment.

Sec. 3. *Be it further enacted, etc.*, That it shall be the duty of each of said Boards of Commissioners daily, upon the receipt of any sum or sums of money, in payment of any assessment levied as aforesaid, to deposit the same with the "fiscal agent of the City of New Orleans," to the credit of the draining fund of its section or district; and the amount or amounts so deposited with said fiscal agent, as a special fund for the payment of the annual interest on said draining bonds, and the redemption of said bonds at maturity, and shall only be drawn therefrom to pay said annual interest or redeem said bonds, or for the purpose of purchasing bonds as hereinafter provided; *Provided*, That no portion of said fund shall be drawn except by virtue of a resolution of the Board of Commissioners depositing the same, and for the purpose aforesaid.

Sec. 4. *Be it further enacted, etc.*, That whenever, after the payment of the annual interest on said bonds, and of such bonds as have matured, the amount remaining with said fiscal agent, to the credit of the drainage fund aforesaid, of either of said draining sections or districts, shall exceed the sum of $10,000, it shall be the duty of the Board of Commissioners, of such section or district, to advertise during thirty days in the official journal of the City of New Orleans for sealed proposals for the sale to said board of such of the draining bonds thereof, having the shortest period to run, and amounting to the sum so remaining on deposit as aforesaid; and at the expiration of said publication, said Board of Commissioners shall open

said sealed proposals and accept the lowest bid or bids: *Provided*, that no bid shall be accepted which demands more than the face of the bond.

Sec. 5. *Be it further enacted, etc.*, That after the completion of the works for the leveeing, draining, and reclaiming of either of the draining sections or districts aforesaid, the Boards of Commissioners thereof shall annually make an estimate of the amount required to keep up and maintain the said works and continue the draining thereof, and shall furnish the said estimate to the Common Council of the City of New Orleans for that portion lying within the limits of said city, and to the Police Jury of the parish of Jefferson, for that portion lying within the limits of the parish of Jefferson; and it shall be the duty of the said Common Council and the said Police Jury respectively to levy a uniform tax or assessment upon the superficial or square foot of the lands situate within said draining sections or districts respectively, sufficient to meet the amounts respectively required, and the tax or assessment so levied shall be collected in the same manner as the city and parish taxes, and paid unto the respective Boards of Commissioners, who shall disburse and account for the same.

Sec. 6. *Be it further enacted, etc.*, That it shall be the duty of each of said Boards of Commissioners, in the month of January of each year, to make a full and complete report to the Common Council of the City of New Orleans and the Police Jury of the parish of Jefferson respectively, showing what works have been made, or may be in progress, the condition and costs thereof; what bonds have been issued and the amounts derived therefrom, the disposition thereof, what amounts from assessments have been paid, the condition of the Trust Fund, and generally all such other information as may be required or be of interest.

Sec. 7. *Be it further enacted, etc.*, That the bonds which may be issued by either of the Boards of Commis-

sioners, by virtue of [this act, shall be exempt from any and all taxation in whose hands the same may be found.

Sec. 8. *Be it further enacted, etc.*, That the said Boards of Commissioners shall have at all times access to, and the right of copying or causing to be copied, any plans or parts of plans, of the City of New Orleans and the parish of Jefferson, in the possession or keeping of the Common Council of said City of New Orleans or of the parochial authorities, or of any surveyor or any other officer thereof, to be certified by such custodian to be a correct copy or copies thereof, and the same to include the street or streets, roads or highways of any portion or section thereof, to be drained according to the provisions of this act, and of the act to which this act is supplementary.

Sec. 9. *Be it further enacted, etc.*, That this act shall take effect and be in full force from and after its passage.

WM. W. PUGH,
*Speaker of the House of Representatives.*

WM. F. GRIFFIN,
*President of the Senate.*

Approved March 17, 1859.

ROBERT C. WICKLIFFE,
*Governor of the State of Louisiana.*

A true copy.
ANDREW S. HERRON,
*Secretary of State.*

## EXHIBIT C.

[Act 57 of the Acts of 1861.]

AN ACT To provide for the Collection of the Assessment for Drainage, under the acts of March eighteenth, eighteen hundred and fifty-eight, and the act supplementary thereto of March seventeenth, eighteen hundred and fifty-nine.

Section 1. *Be it further enacted by the Senate and House of Representatives of the State of Louisiana, in General Assembly convened*, That the amount of assessment which the Boards of Commissioners of the several draining districts are authorized to fix and apportion, to be paid yearly by the owner or owners of the lands within said districts, in order to pay the annual interest on the bonds issued or to be issued by said Boards of Commissioners, and such bonds as may mature by virtue of the second section of an act supplementary to an act to provide for leveeing, draining and reclaiming swamp lands in certain portions of the parishes of Orleans and Jefferson, approved March eighteenth, eighteen hundred and fifty-eight, shall be collected and sued for, the following mode of proceedings, to-wit: As soon as any assessment has been made, and notice thereof shall have been given, a copy thereof shall be filed in the Third District Court of New Orleans, for the assessment made on property within the limits of the parish of Orleans, and in the Third Judicial District Court sitting at Carrollton for assessments made on property within the limits of the parish of Jefferson, on which tableau of assessment thus to be filed the property assessed shall be set forth, together with the amounts assessed, *and the names of the owners therof*, if known, and if the owners' names are not known, then it shall be *stated in said assessment roll that the property assessed belongs to owners unknown;* that a petition shall be filed with said assessment roll praying for an order that *all persons whom it*

mote the health and prosperity of the city of New Orleans and to advance the interest of domestic and foreign commerce, the following act is passed:

Section 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana in General Assembly convened*, That the first, second and third drainage districts, created by the act approved March eighteenth, one thousand eight hundred and fifty-eight, are hereby consolidated, and all offices created thereby are hereby abolished, and the property and affairs of said drainage districts shall be disposed of and conducted as follows: The commissioners of the first and third drainage districts shall turn over to the Mayor of the city of New Orleans all canals, dredge boats, drainage machines, engines and buildings, properly belonging to said districts, and the commissioners of the second drainage district shall turn over all such property, as is above specified, as belongs to said second district, to the Mayor of the city of New Orleans, to the Mayor of the city of Jefferson, to the Mayor of the city of Carrollton and the police jury of the parish of Jefferson, left bank, in such proportions as may belong to said corporations respectively: the property thus turned over to be disposed of by said municipal and parochial corporations in such manner as may be deemed most advisable, and all other property, such as maps, plans, tableaux, all books pertaining to the business of said drainage districts, all moneys and credits, deeds, mortgages, and all other evidences of title to real estate, and all assessments of taxes, etc., shall be turned over by the commissioners of said drainage districts to the commissioner of drainage, whose appointment is hereinafter provided for; and when said commissioner of drainage shall have been appointed and qualified, as hereinafter provided, the commissioners of said drainage districts are required to make a full exhibit to him of all their accounts and transactions, and to make a full settlement with him, and to turn over to him all the property and rights belonging to said drainage

districts not hereinbefore required to be turned over to other parties; and, on failure or refusal to comply with the provisions of this act on the part of said drainage commissioners, the commissioner of drainage shall have power to institute suit in his own name to compel settlement on the part of said drainage commissioners, and to recover and possess himself of all property and rights required to be turned over to him by the provisions of this act.

Sec. 2. *Be it further enacted, etc.*, That there shall be appointed by the Governor, with the advice and consent of the Senate, a commissioner to be known as the "Commissioner of Drainage," who shall be a resident of the parish of Orleans or Jefferson, on the left bank of the Mississippi river, who shall give bond in the sum of seventy-five thousand dollars, with good and solvent security, to be approved by the Governor, conditional for the faithful discharge of his duties, who shall hold office for the term of two years and until his successor shall be appointed and qualified; but who shall be subject to removal by the Governor.

Sec. 3. *Be it further enacted, etc.*, That it shall be the duty of said commissioner of drainage to take possession of all the property required to be turned over to him by section one of this act, and to retain and preserve the same, to settle and adjust all the accounts of the commissioners of the drainage districts aforesaid, and to assess and collect all taxes which have not been assessed or collected under the provisions of said act, approved March eighteenth, one thousand eight hundred and fifty-eight, and under the acts supplemental and amendatory thereto; and for the purposes of said assessments and collection of taxes, the provisions of the acts now in force shall be and remain in full force until said assessments and collections are completed. That the commissioner of drainage shall deposit all moneys collected or received by him with the

State Treasurer so soon as the same shall come into his hands; and the State Treasurer shall not use or permit to be used the money so deposited with him for any purposes other than as hereinafter specified.

Sec. 4. *Be it further enacted, etc.*, That the taxes due for drainage purposes shall remain a first mortgage and privilege upon the lands upon which they are assessed or may be assesssed, and their collection may be enforced by the commissioner of drainage by the legal means and remedies now in force, or such as may hereafter be provided. The commissioner shall, as soon as practicable, make out a statement in duplicate of the taxes, assessed or to be assessed on the land in said drainage districts, which have not been collected, and lodge a copy of the same with the State Auditor and a copy with the State Treasurer, and said commissioner shall be entitled to receive a commission of two and one-half per cent on all moneys collected by him, which shall be in full compensation for all his services and expenses under this act; *provided*, that he shall keep a full and accurate account of all his transactions, and shall, at the expiration of his office, make a full and final settlement of his accounts with the State Auditor.

Sec. 5. *Be it further enacted, etc.*, That as soon as the New Orleans and Ship Island Canal Company shall have excavated a portion of their canal, commencing at a point near the Mississippi river, and extending to Chef Menteur, in the direction of the Rigolets, as provided in the charter of said company, and shall have excavated the same to a width of fifty feet at the top and forty feet at the bottom, with a depth of six feet, provided the same is done within two years from the passage of this act, upon application of the president of said company, the Governor shall appoint a competent engineer to examine said excavation, and who shall report thereon to the Governor and State Auditor, in writing, and in case his report shows that the

said excavation has been made in accordance with the requirements of this act, the State Auditor shall draw his warrant on the State Treasurer in favor of the treasurer of said company for a sum equal to one-fourth of the amount of the uncollected taxes assessed upon the lands in said drainage districts, according to the statement filed by the commissioner of drainage, as required by section five of this act, and on presentation of said warrant the State Treasurer shall pay the same, provided there are sufficient funds in his hands deposited by said commissioner of drainage, and in case there be not sufficient funds in his hands, then to the extent of such funds, and as rapidly thereafter as the same shall be collected and paid over to him; *provided*, that said company shall pay the said engineer for his services in making said examination and reports, and when said company shall have further excavated said canal to a width, in all, of one hundred feet at the top, and eighty feet at the bottom, and a depth, in all, of six feet; *provided*, the same is completed within three years from the passage of this act, and upon the certificate of the engineer to be appointed as before provided, to such fact, the State Auditor shall issue a second warrant on the State Treasurer for a sum equal to the amount of the first warrant, payable to the treasurer of said company, which shall be paid in the same manner as is herein specified for the payment of the first warrant; and when said company shall have further excavated said canal to a depth of nine feet in all, and a width at the bottom of seventy-five feet, provided the same is done within four years from the passage of this act, and the fact certified to by the engineer appointed as hereinbefore provided, the State Auditor shall issue a third warrant in like manner and for like amount as is provided in the case of the first and second warrants, and shall be paid as is provided for their payment; and when said canal shall have been further excavated to a depth of twelve feet in all, with a width at the bottom of seventy feet, and

suitable locks connecting the said canal with the Mississippi river, and the same certified to by the engineer as before provided, the State Auditor shall issue a fourth warrant, in the same manner and for the same amount as is provided for the issuing of the preceding warrants, the payment of which shall be made as is provided for their payment.

Sec. 6. *Be it further enacted, etc.*, That the Governor shall, upon the receipt of the first certificate or report of the engineer, appointed as hereinbefore provided, cause a patent to be issued to said company for one hundred thousand acres of land, to be selected by said company out of any lands belonging to the State. When said company shall notify the Governor that they have selected the lands, and shall have filed a description of the same in the State land office, with the necessary plots, then the Governor shall issue a patent conveying the title to said company as hereinbefore provided. In like manner shall the Governor issue his patent for one hundred thousand acres of land for each of the other certificates of the engineer as before required. It is further provided that upon the completion of said canal to a depth of twenty feet, with a surface width of one hundred and fifty feet from the Mississippi river to the Rigolets, and the fact certified to by the engineer appointed, as hereinbefore provided, the Governor shall then issue a patent to said company for all the lots or blocks of land, or any real estate held by the commissioner of drainage in trust for said company. The said company shall have the right to enter upon any of the public lands of the State and select from the same, in accordance with the survey made by the United States government, an amount of land not exceeding four hundred thousand acres, and upon said company filing plots of the same, with a legal description of each subdivision, with an accompanying statement in writing that the same have been selected, to be reserved for said company until they

shall be entitled to a patent, in accordance with the provisions of this section. Said statement shall be signed by the president of said company, to which shall be affixed the seal of the same, when the plots, together with the description of the lands selected as aforesaid, shall have been filed in the State land office, as before provided. Said lands so selected shall be withdrawn from market, and not subject to sale, grant, or transfer, for any cause whatever, except as hereinafter provided.

Sec. 7. *Be it further enacted, etc.*, That the title to all lands, whether legal or equitable, held by the commissioners of the drainage districts, or belonging to said drainage districts, shall pass to and be vested in the said commissioner of drainage, and shall be disposed of in the manner provided in section seven of this act, and the said commissioners of said drainage districts shall convey said lands to said commissioner of drainage.

Sec. 8. *Be it further enacted, etc.*, That if any officer of said drainage districts shall refuse to perform any duty required of him by this act, he shall be deemed guilty of a high misdemeanor, and, on conviction thereof, shall be punished by fine or imprisonment, or both, at the discretion of the court.

Sec. 9. *Be it further enacted, etc.*, That in consideration of the aid and grants conferred by virtue of this act, the said company shall construct and maintain a suitable levee or embankment of suitable dimensions along the north line of their canal, from the Mississippi river, a distance of five miles, so as to prevent the city from being overflowed by any crevasse occurring above its intersection with the river; also to prevent the city from being overflowed by water blown from Lake Pontchartrain. No money or lands shall vest in said company until the engineer to be appointed as hereinbefore provided shall certify that said protection levee is completed in accordance with the provisions of this act.

Sec. 10. *Be it further enacted, etc.*, That all laws and parts of laws conflicting with the provisions of this act be and the same are hereby repealed, and this act shall take effect from and after its passage.

(Signed) CHAS. W. LOWELL,
*Speaker of the House of Representatives.*

(Signed) OSCAR J. DUNN,
*Lieutenant Governor and President of the Senate.*

Received in the Senate, Tuesday, March 2 (second), one thousand eight hundred and sixty-nine.

Tuesday, March second, one thousand eight hundred and sixty-nine.

The Governor having returned to the Senate, in which it originated, a bill entitled "An act to repeal all laws and parts of laws creating draining districts, in certain portions of the parishes of Orleans and Jefferson, and providing the mode and means for draining the same, and to provide for the disposition of property belonging to the said draining districts and for collecting the taxes for draining purposes, and the manner the funds so derived are to be appropriated to aid in the construction of the New Orleans and Ship Island Canal," with his objections thereto, the Senate proceeded, in pursuance to the Constitution, to consider the same, and resolved that said bill do pass, two-thirds of all the members present in the Senate agreeing to pass the same.

(Signed) CHAS. H. MERRITT,
*Secretary of the Senate.*

Received in the House of Representatives, March second, one thousand eight hundred and sixty-nine.

Tuesday, March second, one thousand eight hundred and sixty-nine, and on the same day the House proceeded in pursuance to the Constitution to reconsider the bill entitled "An act to repeal all laws and parts of laws creating

draining districts in certain portions of the parishes of Orleans and Jefferson, and providing the mode and means for draining the same, and to provide for the disposition of the property belonging to the said draining districts, and for collecting the taxes for draining purposes, and the manner the funds so derived are to be appropriated to aid in the construction of the New Orleans and Ship Island Canal," which was returned to the Senate by his Excellency the Governor, with his objections, and sent by the Senate to the House, with the message of the Governor returning the bill.

*Resolved*, That the bill do pass, two-thirds of all the members present in the House agreeing to pass the same.

(Signed) WM. VIGERS,

*Chief Clerk of the House of Representatives.*

A true copy:

GEO. E. BOVEE,

*Secretary of State.*

## EXHIBIT E.

[Act 4 of the Acts of 1870.]

AN ACT to amend and re-enact an act entitled "An Act to repeal all laws and parts of laws creating draining districts in certain portions of the parishes of Orleans and Jefferson, and providing the mode and means for draining the same, and to provide for the disposition of the property belonging to the said draining districts, and for collecting the taxes for draining purposes, and the manner the funds so derived are to be appropriated to aid in the construction of the New Orleans and Ship Island Canal," passed March 2, 1869.

Section 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana, in General Assembly convened*, That the above entitled act is hereby amended and re-enacted so as to read as follows: That the first, second, and third draining districts, created by the act approved March 18, 1858, are hereby consolidated, and all offices created thereby are abolished, and the property and affairs of said draining districts, consisting of and including all canals, dredge boats, draining machines, engines, buildings, real estate, maps, plans, tableaux, books, moneys, credits, deeds, mortgages, and all other evidences of title to real estate, and all assessments of taxes pertaining to the business of drainage, shall be turned over by the commissioners of the said draining districts to the New Orleans and Ship Island Canal Company, which said Company is hereby invested with all the rights, powers, and privileges conferred on said Board of Draining Districts, by act of March 18, 1858, and the acts amendatory and supplemental thereto; and when said Company shall have executed a bond as hereinafter provided, the commissioners of said draining districts are hereby required to make a full exhibit to said Company of all their accounts and transactions, and to make a full settlement with said Company, and to turn over to said Company all the property and rights belonging to said draining

districts, and on failure or refusal to comply with the provisions of this act, on the part of said drainage commissioners, said Company shall have power to compel settlement on the part of said drainage commissioners, and to recover and possess themselves of all property and rights required to be turned over to them by the provisions of this act.

Sec. 2. *Be it further enacted, etc.*, That the president of said Company shall give bond in the sum of $75,000, with good and solvent security, to be approved by the Governor, conditional for the faithful discharge of the duty hereby reposed in said Company in relation to the property and business pertaining to drainage.

Sec. 3. *Be it further enacted, etc.*, That it shall be the duty of said Company to take possession of all the property required to be turned over to them by section 1 of this act, and to retain and preserve the same, to settle and adjust all the accounts of the commissioners of the draining districts aforesaid, and to assess and collect all taxes which have not been assessed or collected under the provisions of said act, approved March 18, 1858, and for the purposes of said assessments and collection of taxes the provisions of the acts now in force shall be and remain in full force until said assessments are completed. That said Company shall deposit all moneys collected or received by them for drainage purposes with the State Treasurer as soon as the same shall come into their possession, and the State Treasurer shall not use or permit to be used the moneys so deposited with him for any purposes other than as hereinafter specified.

Sec. 4. *Be it further enacted, etc.*, That the taxes due for drainage purposes shall remain a first mortgage and privilege upon the lands upon which they are assessed, or may hereafter be assessed, and their collection shall be enforced by said Company by the legal means and remedies now in force, or such as may hereafter be provided.

Said Company shall, as soon as practicable, make out a statement in duplicate of the taxes assessed on the lands in said draining districts, and upon the lands hereinafter included in said draining districts, which have not been collected, and lodge a copy of the same with the State Auditor and a copy with the State Treasurer, and said Company shall be entitled to receive a commission of 2½ per centum on all moneys collected by them under the provisions of this act for drainage purposes, which shall be in full compensation for all the services and expenses of said Company in collecting the same.

Sec. 5. *Be it further enacted, etc.*, That said Company shall construct a protection levee around the Cities of Carrollton, Jefferson, and New Orleans, commencing on a point on the Mississippi river, at or near Camp Parapet, thence to the Metairie Ridge, thence along the Metairie Ridge to the Jefferson and Pontchartrain railroad line, thence along or near the line of said railroad to Lake Pontchartrain, thence along or near the shore of said lake to the junction of Lafayette avenue with said lake, thence along the lower line of the city to the Mississippi river, and shall construct the same not less than two feet higher than any known high water mark line; *provided*, that said Company shall not be required to construct such levee on any portion of said route whereon either of said cities shall have constructed a levee for similar purposes; but may enter upon and occupy the same; and shall excavate the New Orleans and Ship Island Canal from a point on the Mississippi river, at or near Camp Parapet, thence through the corporate limits of the Cities of Carrollton, Jefferson, and New Orleans, north of Broad street and south of the Metairie Ridge to its intersection with said protection levee, 100 feet wide at the top and twelve feet deep, with proper slopes at the sides, the depth of water to be computed from the mean level of Lake Pontchartrain, and shall connect the same with Lake Pontchartrain by means of a canal of like dimensions; and shall erect embank-

ments on both sides of said canal along that portion of the same included within the limits of said protection levee, of such dimensions as to prevent its water from overflowing the adjacent lands; and said Company shall also construct a sufficient number of draining machines on the line of said canal to drain therein the surface water from the swamp lands embraced within the limits of the aforesaid protection levee; said draining machines shall be connected with the present drainage canals of said cities and such other drainage canals as said Company may hereafter excavate, and shall be constructed so as to pump the water from said cities to a depth of at least ten feet below the mean level of Lake Pontchartrain.

Sec. 6. *Be it further enacted, etc.*, That said Company shall, at the beginning of each quarter, present to the State Auditor a report of the amount of work they shall have performed in the construction of the aforesaid works during the last preceding quarter, and the cost thereof, and thereupon the State Auditor shall draw his warrant on the State Treasurer in favor of the treasurer of said Company for a sum equal to the amount of such quarterly expenditures, and on presentation of said warrant the State Treasurer shall pay the same, provided there are sufficient funds in his hands deposited by said Company for drainage purposes, and in case there are not sufficient funds in his hands so deposited by said Company, then, to the extent of such funds, and as rapidly thereafter as the same shall have been collected and paid over to him; and said Company shall maintain said protection levee and draining machines in good repair, together with all canals leading to or from said draining machines; *provided*, said canals are such as have been turned over to said Company by said Boards of Drainage Commissioners, or such as have been excavated by said Company for draining purposes, and shall operate or run said drainage machines whenever it is necessary, in order to drain the surface water from the swamp lands of said cities; and said Company shall, at the

beginning of each quarter, present to the State Auditor a quarterly report of the expenses thereof for the last preceding quarter, and thereupon the State Auditor shall draw his warrant on the State Treasurer in favor of the treasurer of said Company for a sum equal to the amount of such quarterly expenditures, and on presentation of said warrant the State Treasurer shall pay the same as hereinbefore provided.

Sec. 7. *Be it further enacted, etc.*, That all taxes heretofore assessed by said Boards of Drainage Commissioners and remaining uncollected are hereby declared to be collectable, and said Company shall immediately proceed with the collection of the whole amount thereof, and all situated and included within the limits of said protection levee and the Mississippi river, not heretofore included in the aforesaid drainage districts, are hereby included in the said draining districts, subject to a like assessment for leveeing, draining, and reclaiming the swamp lands of said districts, which shall be made in the following manner, viz.: Said Company shall cause a plot or plots to be made, accurately designating the limits of the section of land to be assessed, and as far as possible the subdivisions of property therein contained and the names of the proprietors. Such plot or plots shall be deposited in the office of the Recorder of Mortgages of the parish in which the section to be assessed is situated, and notices shall be inserted in two newspapers published in the City of New Orleans at least once a week during eight weeks in succession, announcing that they have levied said tax on said lands, setting forth the rate thereof on each superficial foot of the whole area of each section, and that they will proceed to collect the same at the expiration of sixty days after they shall have filed said plot or plots in the office of the Recorder of Morgages, and each portion of the property situated within the limits of such section, shall be subject to a first mortgage, lien, and privilege in favor of said Company for the amount thus assessed, and 6 per

centum per annum for demand thereof. Said lien, privilege, and first mortgage shall take precedence over all mortgages, liens, and privileges whatsoever, whether tacit, conventional, legal, or judicial, and shall attach to said property until the amount assessed and the interest thereon shall have been paid in full, and said Company shall proceed to collect such assessment at the expiration of sixty days after they shall have filed said plot or plots in the office of the Recorder of Mortgages, and said Company shall, in like manner, proceed to assess and collect a like tax on all lands situated within said draining districts on which said Boards of Drainage Commissioners have not heretofore completed such assessments. The expenses of said Company incurred in making the aforesaid assessments shall be paid in the same manner as herein provided for paying the expenses of said Company in constructing drainage canals and machines.

Sec. 8. *Be it further enacted, etc.*, That the title to all lands, whether legal or equitable, held by the said commissioners of the draining districts or belonging to said draining districts, shall pass to and be vested in said Company, and, at such time as they shall deem best, shall be by them sold at public auction to the highest bidder, after at least thirty days' previous notice in at least one daily newspaper published in the City of New Orleans, and the proceeds of such sales, after paying the expenses thereof, shall be deposited by said company with the State Treasurer to the credit of the aforesaid drainage fund.

Sec. 9. *Be it further enacted, etc.*, That said Company shall also construct substantial bridges across said canal at all points where it crosses shell roads and streets or other railways constructed prior to the passage of this act, provided that the number of such bridges shall not exceed five in all.

Sec. 10. *Be it further enacted, etc.*, That when said Company shall have collected all the money arising from

the aforesaid drainage tax, assessed for the purpose of leveeing, draining, and reclaiming the swamp lands of said draining districts, and shall have expended the same in the construction of the aforesaid protection levee, drainage canals, bridges, and drainage machines, and in maintaining and operating the same, according to the provisions of this act, thereupon said company shall make a full and final settlement of all their accounts with the State Auditor, relating to the business of drainage, and shall turn over to him all drainage canals, except the New Orleans and Ship Island Canal, or any part thereof, or any of its branches, basins, or harbors, and shall also turn over to him all levees, except those on the banks of the said New Orleans and Ship Island Canal and its branches, basins, and harbors, together with all draining machines, engines, buildings, maps, plans, tableaux, books, credits, deeds, mortgages, and all other evidences of title to real estate pertaining to or relating to the business of drainage.

Sec. 11. *Be it further enacted, etc.*, That said company is hereby authorized and empowered, and may, by its agents, surveyors, engineers, and employes, enter upon all lands and tenements through which they may conclude to make the canals and levees provided for in this act, and forever expropriate the same for such purposes, in the same manner as provided in the act constituting the charter of said company, approved Oct. 4, 1868, for laying out, locating, and constructing the New Orleans and Ship Island Canal.

Sec. 12. *Be it further enacted, etc.*, That said company shall have the exclusive right to construct and maintain a shell or otherwise parcel road on said levee, and to collect tolls for the use of the same, and shall also have the exclusive right to construct, equip, own, maintain, and operate a horse [or] pneumatic railway thereon.

Sec. 13. *Be it further enacted, etc.*, That said company shall keep a full and accurate account of all its transactions relating to the business of drainage, and make a concise

and complete report of the same to the State Auditor on the first day of January of each year.

Sec. 14. *Be it further enacted, etc.*, That the office of Commissioner of Drainage is hereby abolished, and all property and rights acquired by said commissioner of drainage, under and by virtue of the provisions of the aforesaid act, passed March 2, 1869, shall be turned over to and are hereby vested in said company, including all such as are involved in the suits now pending in the courts of this State.

Sec. 15. *Be it further enacted, etc.*, That when said company shall have excavated the New Orleans and Ship Island Canal 150 feet wide at the top, and 100 feet wide at the bottom, and twelve feet deep, measuring from the mean level of Lake Pontchartrain, commencing within the corporate limits of the City of New Orleans, at a point to be selected by said company, to Ship Island, upon application of the president of said company, the State Engineer, or any one of the engineers of the Board of Public Works, shall examine said excavation and report thereon to the Governor and State Treasurer in writing; and in case that his report shows that said excavation has been made in accordance with the requirements of this act, the Governor shall, upon the receipt of the certificate or report of said engineer, that said canal has been completed, as herein provided, issue his patent to said company for 400,000 acres of land, to be selected by said company out of any lands belonging to the State, provided said company shall have previously notified the Governor that they have selected the lands, and shall have filed a description of the same in the State Land Office, with the necessary plots.

Sec. 16. *Be it further enacted, etc.*, That said company shall construct said New Orleans and Ship Island Canal on the route that they shall deem the most practicable within the limits prescribed in this act and the charter of said company; and may excavate the same through any lake or bayou on such route, including any portion of Lake

Pontchartrain; *provided, however*, that said company shall not have the right to charge or collect any toll on any vessel navigating that portion of the canal excavated through the navigable waters of said lake.

Sec. 17. *Be it further enacted, etc.*, That said company shall have the right to enter upon any of the public lands of the State and select from the same, in accordance with the survey made by the United States Government, an amount of land not exceeding 400,000 acres; and upon said company filing plots of the same, with a legal description of each subdivision, with an accompanying statement in writing that the same have been selected to be reserved for said company until they shall be signed by the president of said company, to which shall be affixed the seal of the same, said lands so selected shall be withdrawn from market, and not subject to sale, grant, or transfer for any cause whatsoever, except as hereinbefore prescribed.

Sec. 18. *Be it further enacted, etc.*, That all cases in the Supreme Court or any of the other courts of this State, under the provisions of this act relating to drainage, shall have priority and preference over all other cases therein, and that all acts and parts of acts inconsistent with the provisions of this act are hereby repealed.

Sec. 19. *Be it further enacted, etc.*, That this act shall take effect and be in force from and after its passage; *provided*, said company shall file a copy of their acceptance of the same with the Secretary of State within thirty days thereafter.

(Signed) MORTIMER CARR,
*Speaker of the House of Representatives.*

(Signed) OSCAR J. DUNN,
*Lieutenant Governor and President of the Senate.*

Approved March 16, 1870.

(Signed) H. C. WARMOTH,
*Governor of the State of Louisiana.*

A true copy:

GEO. E. BOVEE,
*Secretary of State.*

## EXHIBIT F.

[Act 30 of 1871.]

AN ACT to provide for the drainage of New Orleans.

Whereas, The proper and efficient drainage of the City of New Orleans is of paramount importance to the sanitary and commercial interests of the city, as also of the State of Louisiana; and whereas, the Mississippi and Mexican Gulf Ship Canal Company are prepared to immediately undertake the work with the only kind of machinery adapted thereto and now ready for use, and to prosecute the same with energy and economy to completion, therefore—

Section 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana, in General Assembly convened*, That the Mississippi and Mexican Gulf Ship Canal Company, a corporation now existing and domiciled in the city of New Orleans, be and is hereby authorized and empowered to excavate drainage canals and build protection levees within the present corporate limits of New Orleans and Carrollton, under the conditions and with the stipulations hereinafter expressed.

Sec. 2. *Be it further enacted, etc.*, That the said Mississippi and Mexican Gulf Ship Canal Company shall be authorized and empowered to dig a canal, and with the earth removed from the same to build outside of said canal a protection levee, in rear of the city of New Orleans and near the shore of Lake Pontchartrain; the exact location of the said canal and levee, and of all canals dug and levees built by the said company, to be designated and fixed by the Board of City Administrators, and the title to the lands necessary for said works to be procured and held for the benefit of the City of New Orleans, by the Board of Ad-

ministrators of the City of New Orleans; the said lake shore canal to be not less than sixty-five feet wide on the surface and fifteen feet deep in the middle, with proper slope of the sides, the said canal or canals along the lake shore to serve as a reservoir for draining the City of New Orleans and the lands in the rear of the city, the drainage to be pumped from the canal over into the lake, and the said protection levee to be not less than one hundred feet wide, and of sufficient height to completely protect the city from overflow from Lake Pontchartrain,

Sec. 3. *Be it further enacted, etc.*, That said company shall also be authorized and empowered to excavate canals of the dimensions and at such localities as may be fixed by the Board of Administrators of the City New Orleans, which shall fully drain the area bounded by the protection levees herein contemplated and the Mississippi river, and connect with the drainage canals now located in the said area.

Sec. 4. *Be it further enacted, etc.*, That the said company shall also be empowered and authorized to build a canal and protection levee below the City of New Orleans to connect the lower end of the protection levee, along the lake, with the Mississippi, of a sufficient size to fully protect the city from overflow, and on a line to be designated by the Board of Administrators; and to construct a like canal and protection levee above the city, the dimensions and locality in like manner to be designated by the said Board of Administrators; the object of these two canals and protection levees to be the protection from overflow of the areas between the Mississippi river and Lake Pontchartrain, above the New or Company canal, and below the Carondelet canal.

Sec. 5. *Be it further enacted, etc.*, That the said Mississippi and Mexican Gulf Ship Canal Company shall be authorized and empowered to dig all the smaller canals, required for the drainage of New Orleans and the lands in

the rear of the said city, of the dimensions of ten feet or more than ten feet in width.

Sec. 6. *Be it further enacted, etc.*, That the Board of Administrators shall be required, and it is hereby made their duty immediately after the passage of this act, to locate the lines of the canals and protection levees, specified in the various sections of this act, in time to prevent delay in the prosecution of the work on the part of the said company. The Board of Administrators are also required to build and run all the pumps and drainage machines necessary to lift the drainage water from the said canal or canals over into Lake Pontchartrain, and moreover to keep the water in the canals in process of excavation, so far as practicable, at the proper level for the work of excavation, and at the same time assist the drainage of the adjacent lands; and should the City Council fail to locate the lines of said canals and protection levees above specified, the City of New Orleans is hereby made liable to the said company for the damages resulting from such delay.

Sec. 7. *Be it further enacted, etc.*, That said Mississippi and Mexican Gulf Ship Canal Company shall be required to have ready for work, within fifteen days after the passage of this act, machinery of sufficient power to excavate at least twenty-five thousand (25,000) cubic yards per month, and to move the same the distance required to build the protection levee, and to increase as soon as practicable their machinery to the capacity of at least fifty thousand cubic yards per month.

Sec. 8. *Be it further enacted, etc.*, That at the end of every month it shall be the duty of the City Surveyor of New Orleans, or an engineer appointed by the Board of Administrators for that purpose, to examine the work done by the said Mississippi and Mexican Gulf Ship Canal Company during said month, and upon the measurement of the width and depth of the canal, canals, or parts of canals dug, and protection levees built, certify as to the

number of cubic yards excavated and the number of cubic yards of protection levees built during the said month. it shall be the duty of the Administrator of Accounts, on the presentation to him of the said certificate of the City Surveyor, or engineer appointed by the Board of Administrators, by the president of the said Mississippi and Mexican Gulf Ship Canal Company, to draw a warrant or warrants on the Administrator of Finance, in payment of the work so done, at the rate of fifty (50) cents per cubic yard ot excavation, and fifty (50) cents per cubic yard for the protection levee, the said warrants to be of such denomination as may be required by the president of the said company. These warrants it shall be the duty of the Administrator of Finance to pay on presentation to him, in case there be any funds in the city treasury to the credit of the said Mississippi and Mexican Gulf Ship Canal Company; but should there not be sufficient funds to cash the said warrant or warrants, then the Administrator of Finance is hereby required to endorse upon the same the date of presentation, after which date the said warrant or warrants shall bear interest at the rate of eight per cent. per annum until paid, which condition shall be set forth in the form of the said warrant or warrants.

Sec. 9. *Be it further enacted, etc.*, That, in order to provide funds for the payment of the work to be done by the said company, the three boards of draining commissioners for the draining districts of Orleans and Jefferson, established under the acts of March 18, 1858, of March 17, 1859, and the several amendments thereto, and any and all other person, persons, or corporations, who may have them in possession, shall transfer to the Board of Administrators of New Orleans all moneys, assessments, and claims of drainage in their hands or under their control, all titles to real estate, all books, plans, tableaus, judgments in favor of commissioners, the office furniture of said drainage commissioners, a true statement of the claims of said drainage commissioners against the city,

to be adjudicated and settled out of the money collected by the city, and everything pertaining to said draining districts; that the Board of Administrators of New Orleans be and are hereby subrogated to all the rights, powers, and facilities possessed and enjoyed by the commissioners of the several draining districts, or of any other corporation charged with the duty of drainage and leveeing within the limits of the City of New Orleans and Carrollton; that the Board of Administrators be and are hereby authorized and directed to collect from the holders of property within the said districts the balance due on the assessments, as shown by the books of the first, second and third drainage districts, under the acts of March 18, 1858, that of March 17, 1859, and the several supplementary and amendatory acts thereto, which said assessments are hereby confirmed and made exigible, at such time and in such manner as the Board of Administrators may designate; *Provided*, that the said board shall collect the assessments herein authorized in time to provide for the payment of the warrants to be issued to the said company at the date of their issue; also, to make assessments of two mills per superficial foot in those parts of the three draining districts, as existing under and created by the acts of March 18, 1858, and of March 17, 1859, and amendments thereto, and on such other lands as are brought within the protection levees contemplated by this act, where no assessments have been made; and to execute and enforce the same as provided for by the several acts of the Legislature, creating and regulating said Boards of Draining Commissioners; *provided*, that all money or moneys received by the said Board of Administrators from the said commissioners of the drainage districts, either from the sale of property received from the said commissioners, from the collection of claims for drainage now due, from the collection of drainage assessments, and from any of the sources of revenue contempleted by the

provisions of this section of this act, be placed to the credit of the Mississippi and Mexican Gulf Ship Canal Company, and held as a fund to be applied only to the drainage of New Orleans and Carrollton, in accordance with the provisions of this act; and that all property, not money, so received, shall be held in trust for the payment of said Mississippi and Mexican Gulf Ship Canal Company, and ultimately for the benefit of New Orleans, should the same not be required for the work of drainage; and *provided further*, that the rights, powers, and faculties possessed and enjoyed by said Board of Administrators of New Orleans, relative to drainage, shall be so construed as not to conflict with the rights, powers, and faculties acquired by the said Company, in excavating canals and building levees, as stipulated in the varions sections of this act.

Sec. 10. *Be it further enacted, etc.*, That all acts and parts of acts in conflict with or inconsistent with the various provisions of this act, are hereby repealed, and especially the act entitled "An Act to repeal all laws and parts of laws creating drainage districts in certain portions of the parishes of Orleans, Jefferson," etc., passed *March* 2, 1869, generally known as the Ship Island canal bill; also, an act amendatory thereto, approved *March* 16, 1870.

Sec. 11. *Be it further enacted, etc.*, That it is hereby made the duty of the Board of Administrators to see that the parties whose duty it is to do the same, shall, immediately after the passage of this act, build such levees on both sides of the Carondelet canal, and the New, or Canal and Banking Company's, canal, extending to Lake Pontchartrain and around their basins, as to effectually prevent the overflow of water from the said canals during storm, tides, or high water in Lake Pontchartrain, the dimensions of said levees to be determined by the Board of Administrators.

Sec. 12. *Be it further enacted, etc.*, That this act shall be favorably construed, so as to favor all the purposes and

objects of the same, and the operations of the provisions thereof, and shall take effect from and after its passage.

(Signed) GEO. W. CARTER,
*Speaker of the House of Representatives.*

(Signed) OSCAR J. DUNN,
*Lieutenant Governor and President of the Senate.*

A true copy:
GEO. E. BOVEE,
*Secretary of State.*

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The foregoing act, received in my office, Feb. 24, 1871, having been presented to the Governor of the State of Louisiana for his approval, and not having been returned by him to the House of the General Assembly in which it originated, within the time prescribed by the Constitution of the State of Louisiana, has become a law without his approval.

GEO. E. BOVEE,
*Secretary of State.*

# EXHIBIT G.

[Ordinance No. 814—Administration Series.]

MAYORALTY OF NEW ORLEANS,
City Hall, April 27, 1871.

AN ORDINANCE to provide for the more efficient drainage of the City of New Orleans and environs, and their protection from inundation.

Whereas, By the provisions of act No. 30 of the session of 1871 of the Legislature of Louisiana, it is made mandatory upon the Council of the City of New Orleans to provide, on the part of the city, for an extensive system of drainage, to lay out the lines and fix the location and dimensions of certain canals and levees, and in various ways to recognize the claims and accounts of, and to make settlements with, the Mississippi and Mexican Gulf Canal Company in performing the excavation of such canals and the building of levees; and,

Whereas, The Council of the City deems certain portions of said bill to put in question the right of the City to the proper control of its drainage system and its right voluntarily to contract for the work and agree upon a price for the same, and does not recognize the validity or constitutionality of the said act in certain of its parts; yet, convinced of the importance of an effective drainage system, of the desire of the public for its accomplishment, without further delay, and satisfied of the capacity and readiness of the said company to perform the work required by the City, it is deemed proper by the Council aforesaid to ordain as follows:

Section 1. *Be it ordained by the Council of the City of New Orleans*, That all matters appertaining to drainage and the protection of the city from inundation be placed under the immediate charge of the Administrator of Improvements, aided by the City Surveyor.

Sec. 2. *Be it further ordained, etc.*, That the Mayor and Administrator of Finance shall be associated with the Administrator of Improvements as a standing Committee on Drainage, to act until the further pleasure of the Council. It shall be the duty of said committee to prepare a plan of work to be entered upon immediately, and to report to the Council, at its first meeting after the adoption of this ordinance, what canals and levees, or extensions of present canals and levees, are most urgently required; and, upon the approval of the same by the Council, the Administrator of Improvements shall authorize the Mississippi and Mexican Gulf Canal Company to enter upon the performance of the said work under his direction.

Sec. 3. *Be it further ordained, etc.*, That the City expressly declares and notifies the Mississippi and Mexican Gulf Canal Company that it does not waive its right freely to contract for the work of excavating the canals and erecting the levees required, with the said company, or any other party, as may hereafter appear to the best advantage of the city, and that the directing or allowing the said company to enter upon and perform any portion of the said work laid down is not to be considered as implying their exclusive right to its performance or completion, or continuing the same further or otherwise than during the pleasure of the Council. The said company is further notified that such work, and no other, as shall be performed with the consent and approval of the Council, will be settled for as hereinafter provided.

1. The surveyor shall measure and certify the dimensions of all the canals and levees now existing along the line of the works entered upon, so far as the same may form part of the canals and levees to be constructed; the same to be allowed for by the company in deduction of their measurements of work performed and completed.

2. The canal work to be measured and certified month-

ly; the levee work also to be measured and certified monthly, so far as the same shall have been shaped and completed, and sufficiently dried for the passage thereon of vehicles, it being the intention hereof that the levees shall have the full dimensions required after being dried and ready for use; and all payments shall be based upon measurements made of them in that condition.

3. The earth removed from the canals, and not required for levees, shall be the property of the city, and disposed of as the city may deem proper.

4. The city will issue warrants for the payment of the work, as required by the Act of the Legislature, and in case of the non-realization or non-collection of assets provided for therein, the same to bear eight per cent per annum interest; the said warrants to be issued with the understanding, to be inscribed therein or indorsed thereon, that they shall not be enforceable by suit and judgment, but if not paid within one year out of the proceeds of the drainage tax and assets, they shall be fundable in bonds of the city, bearing eight per cent interest, payable semi-annually, having ten years to run, and with due provision for retiring the same, and securing the punctual payment of interest and gradual extinction of the principal. The city shall have power to sell said bonds or give the same in payment of the work performed; but no sale or exchange shall be made at a price less than eighty cents on the dollar, exclusive of interest; and any holder of a fundable warrant, after thirty days notice, if not paid in money, may demand bonds for the same at eighty cents on the dollar.

5. The payments, certificates, and warrants issued to the said company shall be based upon and computed according to the measurements made as aforesaid.

Sec. 4. *Be it further ordained, etc.*, That nothing in this ordinance relating to canals and levees shall be so construed as to imply that the earth taken from a canal and placed upon its banks shall constitute a levee, but only

such deposits as the committee may decide to be necessary for levee purposes shall be paid for.

Sec. 5. *Be it further ordained, etc.*, That the city expressly reserves the right, at any time hereafter, to contest, at law or otherwise, the constitutionality or validity of Act No. 30 of the legislative session of 1871, or any portion thereof, and notifies the Mississippi and Mexican Gulf Canal Company accordingly.

Adopted by the Council of the City of New Orleans, April 25, 1871, the veto of the Mayor to the contrary notwithstanding.

Yeas: Cockrem, Shaw, Delassize, Remick, Bonzano.

Nays: Lewis, Walton.

A true copy:

H. CONQUEST CLARKE,
Secretary.

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## EXHIBIT H.

[Section 47—City Charter, 1870.]

*Be it further enacted, etc.*, That until such time as the debt of the present City of New Orleans shall be reduced to the sum of $7,000,000, it shall not be lawful for the Council of the City of New Orleans, as constituted by this Act, to incur any debt or obligation for any greater sum than $100,000, unless they shall at the same time provide by ordinance or resolution for the payment of both interest and capital within the period of ten years from the date of the contraction of said debt.

# EXHIBIT I.

[Act 73 of the Acts of 1872.]

AN ACT to authorize the Council of the city of New Orleans to levy a police tax; to regulate levies of taxes, the proceedings of tax suits, and the jurisdiction of the district courts for the parish of Orleans in reference thereto; to define and punish forgery in certain cases; to authorize the funding of the floating debt; to consolidate, limit, and provide for the debt of the city of New Orleans, principal and interest; to authorize a tax for the support of the city government, and to establish a fiscal agency, defining its duties, and for the better enforcement of the collection of all taxes.

Section 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana in General Assembly convened*, That the council of the city of New Orleans be and is hereby authorized and empowered to levy and assess a police tax, additional to all taxes levied in the month of December, 1871, for the purpose of defraying the police expenses of the year ending September 30, 1872, and any deficiencies in the revenues of the city arising from the over receipt of police warrants for city taxes.

Sec. 2. *Be it further enacted, etc.*, That said levy shall be made and assessed according to the assessment rolls homologated by the city council December 12, 1871, which, for this purpose, and all future official reference thereto, shall be denominated the assessment rolls for 1872; the city taxes levied December 19, 1871, shall be denominated the taxes of 1872, and the licenses under ordinance No. 1229, Administration series, shall be denominated the licenses of 1872.

Sec. 3. *Be it further enacted, etc.*, That the tax hereinbefore authorized shall not exceed one-half of 1 per cent of the assessed valuation of the real, personal and mixed property, according to the said rolls.

Sec. 4. *Be it further enacted, etc.*, That said levy be made, any provision of section 7 of act No. 42 of 1871 to the contrary notwithstanding, which is hereby repealed so far as it may conflict with any provision of this act.

Sec. 5. *Be it further enacted, etc.*, That the Administrator of Public Accounts shall, as soon as practicable after the passage of this act, cause to be made out the bills required for the collection of the tax, which shall be signed by him, or a person or persons authorized by him so to do. Or he may consolidate the additional police tax herein authorized with the former city tax levies, and make and remake bills for the same, either together or separately; all bills, whether of the present or said former levies for the year 1872, to be signed by the Administrator of Public Accounts, or by a person or persons authorized by him so to do.

Sec. 6. *Be it further enacted, etc.*, That the said bills for additional police tax shall be collectable from March 1, 1872, to July 31, 1872, and exigible thereafter; and may be sued together with or separate from the other city taxes of the year 1872; *provided*, no additional fee shall be allowed to the sheriff or clerk for the fact of there being separate bills for different levies of taxes or separate bills for different properties of the same person; but the taxes of each delinquent may be embraced in a single suit, with but one fee to the clerk and sheriff for their respective services. No crier's fee shall be allowed in any tax suit hereafter.

Sec. 7. *Be it further enacted, etc.*, That for the purpose of all city tax suits, whether for police or other purposes, and whether of one hundred dollars or over or under that amount, all or either of the district courts for the parish of Orleans, excepting the First and Second, are hereby expressly invested with jurisdiction, and justices of the peace are hereby divested of such jurisdiction; *provided*, the Second District Court may entertain jurisdiction of tax suits against successions.

Sec. 8. *Be it further enacted, etc.*, That if at any time any assessment made by or under the authority of the council of the city of New Orleans shall be declared or become void and without effect by reason of non-compliance with

any formality or requirement relative to the imposition of municipal taxes, then and in that case the council shall have full authority and power by ordinance or otherwise to make a new assessment, thus becoming or being declared null and void, and to place the tax bills or certified accounts in court and obtain judgment therefor, after publication for the length of time and in the manner provided for the collection of city taxes, it being the true intent and meaning of this law that the city of New Orleans shall not lose the right to collect annual taxes by reason or on account of any legal informality.

Sec. 9. *Be it further enacted, etc.*, That no money shall be received or collected by the city of New Orleans, by any department, unless an order, bill or receipt for the same shall have been made out by the administrator of the proper department and signed or countersigned by him, or by some person authorized by him; and no receipt to any person for money, notes, or anything else taken by the city on account of revenue, or any other account, shall be valid unless so signed or countersigned.

Sec. 10. *Be it further enacted, etc.*, That it is hereby declared a felony to forge or falsely sign, fill up, alter or utter, or publish as true any bill, certificate, receipt, account, or any part thereof, as given, made out, or signed by the Mayor or any administrator of department of the city of New Orleans, or by any officer, deputy, or clerk, or other person authorized by them or either of them, and which may be given credence to, or pass, or be received as genuine or authorized, and be calculated to deceive or defraud any holder, receiver, transferee, pledgee, or other person. Any person, upon being found guilty of such offense, shall be sentenced to imprisonment at hard labor not less than two nor more than twenty years.

Sec. 11. *Be it further enacted, etc.*, That all taxes due and unsettled at the passage of this act, or hereafter becoming due, are hereby declared to be a lien and privilege upon the property assessed for the same, to have priority over

all other liens or privileges; and against all other properties of delinquent they shall have the force and effect of a lien from the date of their being recorded in the mortgage office as hereinafter provided.

Sec. 12. *Be it further enacted, etc.*, That, as soon as practicable after the passage of this act, the Administrator of Public Accounts shall prepare registers of all taxes due and exigible. For the purpose of aiding him in so doing, the Administrator of Finance, the clerks of courts, the civil sheriff, and all attorneys and ex-officers shall turn over to him, for his temporary use, all bills, accounts, writs, and records in their hands, and for so doing shall not be entitled to any fee. The Administrator of Public Accounts shall enter in duplicate registers all the necessary particulars and dates for recording and settlement of the accounts, including interest and costs incurred. One of said registers, for taxes of 1871 and previous years, with index thereto, he shall deposit in the mortgage office, and the deposit of said register and index shall be a due recording and inscription of the lien and mortgage in said office; and no fee shall be allowed the recorder of mortgages for such inscription; but he shall be allowed one dollar each for cancelling the same, which he may do upon the certificate of the Administrator of Public Accounts of the payment or settlement thereof. After the thirty-first of July in each year a like register for the unpaid taxes of the year shall be in like manner deposited, under the same provisions as the foregoing.

Sec. 13. *Be it further enacted, etc.*, That for unbonded *debts* existing Dec. 31, 1871, and unpaid at the time of the passage of this act, or *caused* by receipts of certificates of 1871, for revenues proper of 1872, and for excavations and levees, drainage machinery, and revetments authorized by law or required for the protection of the city from overflow or inundation, the city may issue from time to time, as they may be required, bonds of the denominations of five hundred and one thousand dollars,

having fifty years to run, and bearing 7 per cent interest, principal and interest payable in gold in New York or New Orleans, and at any other points that the Council may designate, with quarterly coupons, and that the bonds thus issued shall be called the new consolidated debt of New Orleans. No bonds shall be issued but by authority of the Council, nor for a lower rate than ninety cents on the dollar; all issued for the excavations and levees, authorized by Act No. 30 of 1871, or by drainage laws previously enacted, shall be marked "Drainage Series," and all taxes collected for drainage, and not required for the payment of drainage warrants, shall be devoted to the purchase from the lowest bidder of bonds issued for drainage; no bid to be accepted above par, and the right reserved to the Council to reject all unsatisfactory bids.

And for other bonds of the city not matured, bearing interest at not less than 7 per cent, the city may exchange bonds of the new consolidated debt, at such prices, not less than par, for the new consolidated debt bonds as may be found to the advantage of the city; but no exchange shall be effected except by consent and order of the Council, publicly given, or ordinance fully authorizing the same.

For all bonds fully matured and payable so soon as the term they were issued for shall have expired, and which the city shall not have the available funds to pay in cash, the city may exchange new consolidated bonds, at the rate of not less than ninety cents on the dollar on demand of the holders of the bonds so matured.

And it is furthermore enacted that at no time shall the face of the bonded debt outstanding and unredeemed added to the certified debt of every form exceed twenty-three millions of dollars, and all issue of bonds or evidence of indebtedness whatever in excess of said amount shall be unlawful, and shall not import or convey any obligation. And if any person under color of office, or otherwise, shall issue any bond or warrant in violation of this section,

he shall be prosecuted criminally by indictment or information, and, upon conviction, shall be condemned to imprisonment for two years; and any person negotiating or attempting to negotiate such bond or warrant shall be considered an accessory to the fact, and subject to the same punishment as the said offender.

Sec. 14. *Be it further enacted, etc.*, That within the months of November and December, 1872, and annually thereafter, the Council shall adopt estimates of receipts and expenditures (the latter including police and excluding schools) for the ensuing year. The estimate of expenditures shall not be finally adopted until one week shall have elapsed after final adoption of the estimate of revenues, and it shall not exceed the same.

Sec. 15. *Be it further enacted, etc.*, That the Council, after the adoption of the estimate, shall proceed to levy the annual taxes required, towit:

*First*—The City debt tax, which shall be based upon the detailed estimate of the sinking funds and interest falling due. For all bonds for which no other retiring provision exists by law, an estimate shall be included of not less than 2 nor more than 10 per cent of the face of the bonds outstanding of any of the several issues, which shall be applied to the retiring of bonds offered at the most advantageous rates, no bid to be accepted higher than par, and the right reserved to reject all bids. No limit other than herein laid down shall apply to this tax, which is hereby declared a vested right of the bondholders interested.

*Second*—A tax for current city expenses, including police and exclusive of interest and schools. This tax shall in no year exceed 1¼ per cent upon the assessed value of real, personal, and mixed property.

These taxes shall bear the name of the year in which they shall be collectable, and the assessment upon which they shall be made shall be termed the assessments for the said year.

Sec. 16. *Be it further enacted, etc.*, That no provision in any general law of the State limiting the power of taxation by the several cities, towns, parishes, and other corporations, shall be held to apply to any of the taxes of the City of New Orleans, herein or otherwise specially authorized to be levied.

Sec. 17. *Be it further enacted, etc.*, That as soon as practicable after the passage of this act, the Council shall proceed to the election of a chartered State or a National bank, as fiscal agent of the city of New Orleans; and upon its election, acceptance, and entering into due notarial contract, all present fiscal agencies shall cease, and their assets, duties, and functions shall be transferred to the fiscal agencies herein created. That the administrator of finance shall deposit with said fiscal agency, daily, all moneys collected by him from whatever source. That the fiscal agent shall set apart, and keep in separate funds, the sums of money deposited on account of the consolidated loan tax, and for the payment of the interest and principal of the various bonds issued and to be issued by the city of New Orleans, and such funds shall not be subject to the draft of any city official, but shall be a vested right of the bondholders That under the direction of the commissioners of the consolidated debt, or of the Council, under existing laws, said fiscal agent shall purchase from time to time, before maturity, such bonds of the city as there may be funds in its hands to pay for, and shall cancel the same. In the event of interest coupons falling due previously to the collection and deposit of the taxes imposed for the payment of said coupons, it shall be nevertheless obligatory on the fiscal agency hereby created to pay said coupons on presentation, and any amount thus advanced shall be reimbursed to said agency out of the first taxes collected.

It shall have an agency in the city of New York (for the performance of duty by which it shall be responsible),

for the payment of coupons, or redemption of bonds provided to be paid there. The fiscal agency hereby created may be changed and taken away by the Council by a vote of three-fourths of the members thereof, for cause; *provided*, the same can not be removed, or the assets transferred without its consent, so long as the city is indebted to any fund or account, and until the fiscal agency is fully reimbursed, or so long as there shall remain any contract unexpired between it and the city.

Sec. 18. *Be it further enacted, etc.*, That all laws or parts of laws in conflict with this act be and the same are hereby repealed, so far as they are in conflict, and this act shall have force and effect from its passage.

(Signed) O. H. BREWSTER,
*Speaker of the House of Representatives.*

(Signed) P. B. S. PINCHBACK,
*Lieutenant Governor and President of the Senate.*

Approved April 26, 1872.

(Signed) H. C. WARMOTH,
*Governor of the State of Louisiana.*

A true copy:
F. J. HERRON,
*Secretary of State.*

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## EXHIBIT J.

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Article 114. Every law shall express its object or objects in its title.

## EXHIBIT K.

[Act 277 of the Acts of 1859.]

AN ACT to incorporate the City of Carrollton.

Section 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana, in General Assembly convened,* That the territory and inhabitants within the following limits, towit: Beginning at the Mississippi river, on the lower line of Carrollton, in the parish of Jefferson, following said line extended to the line of the city of New Orleans; thence following said city line to the northern limits of said town of Carrollton; thence following the rear line of said town, as laid down on the original plan thereof, to the extreme northwest point formed by the junction of north and south line street; thence along the west side of south line street to upper line street; thence along the upper line of upper line street to the river Mississippi; thence to the point of beginning, and not exceeding the limits assigned to said town per the original plan thereof, by C. F. Zimpel, dated April 16, 1833, and deposited in the office of G. R. Stringer, then notary public in New Orleans, shall continue to be a corporation and body politic, with perpetual succession, by the name of the "City of Carrollton."

Sec. 2. *Be it further enacted, etc.*, That the affairs of said City of Carrollton shall be administered by a Mayor and eight Councilmen, and in and by the name of Mayor and Council of the City of Carrollton, the said corporation shall be, and is hereby made capable in law, to sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in any Court or Courts of record or justice, or other place whatever; but in all proceedings, where, by existing laws, bond and security is required from litigants, the City of Carrollton

shall be dispensed from furnishing bond or security; also to have, hold, purchase, receive, possess, enjoy, and retain to them and their successors all and every kind and quality of property whatever; *provided*, the same be for municipal and public school purposes; and the same to sell, transfer, alien and lease, farm out and dispose of; and may have and use a common seal, which they may alter and change at pleasure; and they shall have a secretary, whose duty it shall be to keep a correct record of all their doings, and make public the same, by posting them up in two or more public places in said city, or to see them published in any paper that may be printed therein; and shall perform such other duties pertaining to the office of a secretary as the Mayor and Council may prescribe. * * *

WM. W. PUGH,
*Speaker of the House of Representatives.*

WM. F. GRIFFIN,
*President of the Senate.*

Approved March 17, 1859.

ROBERT C. WICKLIFFE,
*Governor of the State of Louisiana.*

A true copy.

ANDREW S. HERRON,
*Secretary of State.*

## EXHIBIT L.

[Act 71 of 1874.]

AN ACT to annex the City of Carrollton to the City of New Orleans; to provide for the transfer of certain transcript from the office of the recorder; the transfer of books, papers, documents and property of the City of Carrollton, and also the public schools to the City of New Orleans; to provide for the debt of Carrollton; creating the seventh district of the City of New Orleans, and a municipal court; a sanitary district, and repealing the act incorporating the City of Carrollton.

Sec. 5. *Be it further enacted, etc.*, That all the rights, titles, and interest of the City of Carrollton as now existing in and to all lands, tenements, hereditaments, bridges, ferries, streets, roads, wharves, markets, stalls, levees and landing places, buildings, and other property of whatsoever description and wherever situated, and of and with all goods, chattels, money, effects, dues, demands, bonds, obligations, judgments and judgment liens, actions and rights of action, books, accounts and vouchers, be and they are hereby vested in the City of New Orleans; *provided*, that all estates, income, funds or property of every description now held in trust by said City of Carrollton, or which shall have been specially pledged or affected by the payment of any debt, shall be held by the City of New Orleans under this act upon and for the same uses, trusts, limits, limitations, charities, and conditions as the same are now held; and the debt and all other indebtedness or liabilities of the City of Carrollton, including the funding and improvement bonds and the bonds issued to the Jefferson City Gaslight Company, and known as the gas bonds, and notes, interest coupons, wages, salary due or to become due, warrants or other species of obligations whatsoever, shall be assumed and paid by the City of New Orleans, and said city is hereby declared liable therefor; *provided, further*, that all officers of said City of Carrollton shall continue as at present constituted to discharge the duties of

their respective offices until this act of incorporation can be completed by putting into possession of the proper officers of the City of New Orleans the books, papers, records, documents, and other property now belonging to the City of Carrollton, and no longer; and after which time all the powers, rights, privileges, and immunities possessed and enjoyed by the Mayor and Council of the City of Carrollton shall cease and terminate; *and provided, further*, that the claims or vested rights of any person or persons or company or corporation of said City of Carrollton that have been granted, acquired or received from or against said corporation of the City of Carrollton or otherwise, shall not be interfered with, divested, or impaired by this act, nor by the City of New Orleans, without adequate compensation.

(Signed) CHARLES W. LOWELL,
*Speaker of the House of Representatives.*

(Signed) C. C. ANTOINE,
*Lieutenant Governor and President of the Senate.*

Approved March 23, 1874.

(Signed) WILLIAM P. KELLOGG,
*Governor of the State of Louisiana.*

A true copy:
P. G. DESLONDE,
*Secretary of State.*

## EXHIBIT M.

[Act 16 of the Acts of 1876.]

AN ACT to authorize the City of New Orleans to assume exclusive control of all drainage works in the drainage districts; to authorize the purchase of certain rights and property of the Mississippi and Mexican Gulf Ship Canal Company, and its transferee; and to provide for the manner of making said purchase and for paying therefor in drainage warrants.

Section 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana, in General Assembly convened*, That the Common Council of the City of New Orleans is hereby authorized and empowered to transact and contract with the Mississippi and Mexican Gulf Ship Canal Company, and the transferee thereof, for the purchase and settlement of all or any rights, franchises, and privileges created, authorized, or arising in favor of said company or said transferee under and by virtue of Act No. 30 of Acts of 1871; also for the purchase and transfer to the City of New Orleans of all tools, implements, machines, boats, and apparatus belonging to said company or its transferee, and by it or him used for or pertaining to drainage work authorized to be done by said Act No. 30.

Sec. 2. *Be it further enacted, etc.*, That should it be deemed advisable by said council to make said purchase and settlement, it shall be the duty of said council of the City of New Orleans to provide by ordinance for the appointment of appraisers to estimate the value of the rights and things to be purchased or settled for, and the duties and powers of said appraisers shall be specifically assigned in said ordinance.

Sec. 3. *Be it further enacted, etc.*, That all amounts to be paid, when agreed upon, shall be paid in drainage warrants by the City of New Orleans, which said warrants shall be issued in the same form and manner as those

heretofore issued to the transferee of the said company under Act No. 30 of Acts of 1871 for work done. They shall be made payable out of the drainage assessments, and shall be issued as soon as any agreement shall have been completed.

Sec. 4. *Be it further enacted, etc.*, That whenever the sale and purchase contemplated by this Act shall be completed, and the drainage warrants issued in payment of the price agreed on and fixed, the City of New Orleans, through its officers, shall have exclusive control of all the rights, powers, and franchises granted by Act No. 30 of Acts of 1871, relative to drainage or other public works, to the Mississippi and Mexican Gulf Ship Canal Company or its transferee; the City of New Orleans shall alone have the power, either through its own officers and employees, or by contract to the lowest bidder, to do all canalling, dredging, ditching, or drainage work required to be paid for by assessment upon property or from the city treasury.

Sec. 5. *Be it further enacted, etc.*, That hereafter the City Council shall fix the dimensions of all canal excavations and protection levees required for the City of New Orleans.

Sec. 6. *Be it further enacted, etc.*, That all laws and parts of laws in conflict with the provisions of this Act or inconsistent therewith be and are hereby repealed, and that this Act take effect from and after its passage.

(Signed) E. D. ESTILETTE,
*Speaker of the House of Representatives.*

(Signed) C. C. ANTOINE,
*Lieutenant Governor and President of the Senate.*

Approved Feb. 24, 1876.

(Signed) WILLIAM P. KELLOGG,
*Governor of the State of Louisiana.*

A true copy:
P. G. DESLONDE,
*Secretary of State.*

## EXHIBIT N.

[Act 67 of the Acts of 1877.]

AN ACT to define the object of drainage assessments and to regulate the collection of same, and to prevent judgments for assessments being rendered as personal judgments, and to repeal so much of Act No. 57, approved March 1, 1861, as makes such judgmen s personal, and to confine the execution under assessment judgments to the property on which the assessment is levied.

Section 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana, in General Assembly convened*, That the true intent and meaning of all drainage laws in this State wherein liens and privileges are recorded against property requiring drainage are that under said liens and privileges no assessments for drainage or judgments for the same shall be collected from the property drained, or its owner or owners, until after there has been conferred upon the property such improvements by canals and adequate machinery as will effect the drainage equal in value to the assessment exacted from said property.

Sec. 2. *Be it further enacted, etc.*, That any assessment or judgment embracing the same shall operate only upon the property upon which such assessment is levied.

Sec. 3. *Be it further enacted, etc.*, That all parts of Act No. 57, session acts of 1861, which make judgments on drainage assessments personal judgments be and the same are hereby repealed.

Sec. 4. *Be it further enacted, etc.*, That this Act shall take effect from and after its passage.

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OFFICE OF THE SECRETARY OF STATE,
State of Louisiana.

Received in the office of the Secretary of State at New Orleans, this fourteenth day of April, A. D. 1877. The

foregoing bill having been submitted to his Excellency, the Governor of this State, for his approval and signature, and not having been returned by him to the Senate of the State of Louisiana, in which body it originated, with his approval and signature, or with his objection thereto, within the time prescribed by the Constitution of the State of Louisiana, the same has become a law by limitation of time.

(Signed.) WILL. A. STRONG,
*Secretary of State.*

A true copy.
WILL. A. STRONG,
*Secretary of State.*

## EXHIBIT O.

Decisions of the Supreme Court of Louisiana in the Succession of Irwin, in Davidson vs. New Orleans, Board of Administrators, praying, etc., and State ex rel. Canal Company vs. City et al.

No. 7824.

SUCCESSION OF PATRICK IRWIN. ON OPPOSITIONS.

The claim of the City of New Orleans on an alleged judgment *in personam* for drainage taxes, against a person whose succession was opened in the Second District Court for the Parish of Orleans, was properly before said Court for recognition, classification, and payment by the executors.

Such a judgment is only prescriptible by ten years from its rendition.

Under the Constitution of 1868 several objects might be contemplated in a statute, but each object must have been expressed in its title.

Laws in derogation of common right must be strictly construed and not extended beyond their precise terms.

Of this character are those laws which are designed to substitute a summary mode of procedure to the ordinary rules of practice.

Act No. 30 of the Legislature of 1871 could not constitutionally, under the title of "An act to provide for the drainage of New Orleans," provide for the creation of a new drainage district, and still less for the institution of *extraordinary proceedings* to coerce payment of drainage taxes. The title of that act was not indicative of such and other objects of the statute.

Judgments obtained by the summary proceedings provided for in that law are null and void.

When a testator, after bequeathing by his will a certain claim against his debtor, exchanges with the latter the original evidence of the debt for his bond or other evidences of indebtedness, the legacy is not revoked by implication under the Code of Louisiana.

The practice tolerated by this court, in view of expediting business and lessening costs, of considering as part of the transcript of appeal, records of other cases filed in this court, must be exercised with discretion and within reasonable limits. When, therefore, other transcripts are intended, by agreement of counsel, to be used in this way, as part of the record of the case at bar, reference must be made to the title and number of said other transcripts, and the attention of this court must be called to them, or it will not treat them as part of the evidence before it; and the defect shall not be remedied on application for a rehearing.

Constitutions are to be interpreted in the same manner and according to the same rules as statutes.

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REPORTED IN THE 33RD LA. ANNUAL REPORTS, P. 63.
GIVEN IN EVIDENCE, R. P. 52.

Appeal from the Second District Court, parish of Orleans. Tissot, J.

George S. Lacey, Frank N. Butler, and S. P. Blanc, assistant city attorney, for the City of New Orleans, appellee.

T. Gilmore & Sons, Alfred Grima, and B. R. Forman, for appellants, *contra*.

The opinion of the court was delivered by

BERMUDEZ, C. J. The account presented by the executors is opposed by the City of New Orleans, by E. C. Palmer, and by certain asylums.

The city claims to hold two *personal* judgments against Patrick Irwin.

*One* for $358.50, rendered in January, 1875, for a drainage tax on lands in the *first* drainage district, owned by Irwin at the time; *another* for $5,867.20, rendered in March, 1873, for a similar tax on real estate in the *fourth* drainage district, likewise the property of the deceased.

The city also claims $1,500 for city taxes, and prays to be placed on the account for those sums, with interest,

charges, and costs, with privilege superior to *all* other creditors.

E. C. Palmer, representing himself as the holder and owner of drainage warrants for an amount exceeding $300,000, which he avers are entitled to be paid out of the drainage tax claimed by the city, joins the city in her opposition.

Four asylums oppose the same account, asking to be placed thereon as legatees of a debt due to the deceased, and by him to them and others bequeathed.

The executors have formally joined issue with the city and Palmer, pleading to the jurisdiction of the court, alleging the action to be a *real* one, and next answering that they deny generally and specially each and every allegation contained in the oppositions.

They specially charge:

That the assessment for drainage, under Acts Nos. 165 of 1858 and 191 of 1859, contemplated a benefit to be derived *before* payment of the tax, and that no such benefit has accrued; that the several acts relied upon by the opponents, and specially that creating the fourth drainage district, violate the Constitutions of the State and of the United States, in many respects, particularly that they attempt an expropriation of property without previous indemnity to the owners; that the object, or objects of the laws, are not expressed in their titles; that the assessments violate the rule of equality and uniformity of taxation, according to value; that the city has expropriated a portion of the property on which the tax is claimed for street purposes, and has not paid for the same, judgment therefor notwithstanding; that nearly all the property on which the tax was assessed has been sold by Irwin; that Act 30 of 1871, by fixing a rate of compensation for drainage work in excess of the value thereof, was in violation of the constitutional provisions protective of vested rights; that all the drainage work has been abandoned in the par-

ish of Orleans; that the formalities required by law have not been fulfilled, and that the judgments are nullities.

The executors further pleaded the prescription of three, five and ten years.

The executors have not joined issue with the other opponents.

The oppositions were tried by the lower court. The exception to the jurisdiction and the pleas of prescription were overruled. The city was recognized as a creditor for $5,867.20, as prayed for. The claim for city taxes was rejected. The opposition of the asylums was dismissed. The court omitted to pass upon the claim of the city for $358.50 and on the opposition of Palmer. With those amendments the account was homologated, and the funds were ordered to be distributed accordingly.

From this judgment the executors have appealed. The city and Palmer, answering the appeal, pray that the judgment be amended, by allowing the city the sum of $358.50. The asylums join in the appeal, asking that the judgment be reversed and that they recover, as prayed for, in their opposition.

We will proceed to pass upon the several demands in the order in which they have been announced.

I. The exception of the executors to the opposition of the city, as judgment creditor, was properly overruled. The Second District Court, having *probate* jurisdiction, and before which the succession of Irwin had been opened, could entertain the demand of the city for payment of the judgments, which she represented herself as owning against the deceased, rendered during his lifetime. The law distinctly provides that the payment of all debts in money due by successions shall be *enforced* by the Court of Probates, and that the creditor who has obtained judgment can only be paid concurrently with the other creditors of the succession. C. P. 983. 987; 29 A. 118.

The objection that the action of the city is a *real* one,

of which the Second Court could not take cognizance, is not well founded. From the *exhibits* of assessments on property in the *fourth* drainage district, annexed to the opposition, it appears that the same had been sold by Irwin, and, therefore, did not form part of his succession assets. So that, to the extent of the amount claimed, as the tax due on that property, the action is clearly not real, and is only for the payment of a money judgment. From the *exhibit* likewise annexed, as regards the property in the *first* drainage district, it appears that part of it was assessed in the name of Irwin and that the remaining portion was assessed in the name of others. There can be no objection to a creditor—claiming to have a lien, privilege, or mortgage recognized by judgment—asking of the Probate Court the *enforcement* of the judgment. The executors can have no occasion to complain that they are sued before the court which has jurisdiction of the *mass* of the estate of the deceased, and which is competent to liquidate and satisfy it, by a sale of the property, and a distribution of the proceeds among the parties, creditors, and legatees entitled to the same. By submitting her judgments for enforcement and payment the city has acquiesced in the jurisdiction of the court, and is concluded by the judgment on her claim.

II. We think that the pleas of prescription were properly overruled. The judgments were prescriptible only by *ten* years from the date of rendition. They were rendered in 1873 and 1875, and are not, even now, prescribed, the delay required not having yet elapsed.

III. The record does not contain the judgment first relied upon by the city, to claim the drainage tax on property in the first district for $358.50. We are, therefore, unable to pass upon its merits or regulate its effects.

IV. The second judgment averred by the city is in the transcript. It was rendered on the 20th March, 1873. It homologates the assessment rolls, and is rendered

"against the several pieces of property set forth or described in such tableau or assessment roll, and the respective owners thereof, known and unknown, for the amount or amounts, therein set forth against said property, or the owners thereof, together with interest," etc. T. p. 167.

It appears that the proceedings anterior and conducive to this judgment were instituted and carried on to consummation under the provisions of Act No. 30 of 1871, p. 75, into which it is claimed that the enactments of Act No. 57 of 1861, p. 43, were incorporated, so as to become a component part thereof.

It is necessary to state that in 1858 the Legislature passed Act 165, p. 114, "to provide for leveeing, draining, and reclaiming swamp lands in certain portions of the parishes of Orleans and Jefferson;" that in 1859 this act was amended (Act 191, p. 152); that in 1861 the General Assembly adopted Act No. 57, p. 43, "to provide for the *collection* of the assessment for draining," under acts of March, 1858, and March, 1359, and that by this act *summary* proceedings were authorized, and that in 1871 the Legislature passed an Act No. 30, p. 75, "to provide for the drainage of New Orleans."

The executors claim that this act did not authorize the proceedings in which the judgment pressed was rendered. They charge that the act is reticent about the fourth drainage district; that it confers no authority on the City of New Orleans, either to create that district or to levy any tax for drainage purposes on any such district; that it does not mention, in the least degree, that the collection of said tax shall be made in a *summary* manner, as is claimed was done; that even if it did, those objects are not expressed in its title; that even if they were, the effect of the act would not be to embody in it the Act of 1861, which had been repealed by Act 51 of 1869, and could not be revived in that mode, and they offer further defenses, which we deem unnecessary to mention.

It is to be noticed that Act 30 of 1871 is entitled, "*An Act to provide for the drainage of New Orleans*," and was adopted while the Constitution of 1868 was in force, which provided (Art. 114): "Every law shall express its object *or objects* in its title." Under that provision it was legitimate for a law to contemplate several objects, provided they were expressed in the title of the act. The Legislature in those days frequently availed itself of that privilege, previously unwarranted. Where a law, passed while that Constitution was in existence, had a title expressive of one object only, the inference which it was lawful to draw was that it was not intended to embrace more than the object so mentioned. How easy it *then* was to pass laws against which the defense of unconstitutionality, on the ground of violation of Art. 114, could prove of no avail!

While commenting upon the propriety of such constitutional rule, a writer of distinction said:

"Great abuses have been found to result from a practice of ancient date, of incorporating in the same bill subjects of a very heterogeneous nature, resorted to, either for the purpose of surprising the good faith of the law-making body, or of enlisting hostile interest in support of the proposed acts. To put a stop to this practice many of the States of the Union have incorporated into their fundamental laws the provision necessary to guard against the same." Sedgwick on Construction, 567 and note.

"Titles to legislative acts have come to possess very great importance by reason of constitutional provisions, which not only require that they should correctly indicate the purpose of the law, but which absolutely make the title to control and exclude everything from effect and operation, *as law*, which is incorporated in the body of the act, but is not within the purpose indicated by the title." Cooley, Const. Lim., p. 141; also Walker vs. Caldwell, 4 A. 298.

"The framers of the Constitution meant to put an end to legislation of the vicious character referred to, which was little less than a fraud upon the public, and to require that, in every case, the proposed measure should stand upon its own merits, and that the Legislature should be fairly satisfied of its design when required to pass upon it." 13 Mich. 494; 2 Iowa, 282; 5 N. Y. 293; 7 Md. 151; 24 Ind. 28.

"It may, therefore, be assumed as settled, that the purpose of those provisions was—*first*, to prevent hodge-podge, or 'log-rolling' legislation; *second*, to prevent surprise or fraud upon the Legislature by means of provisions in bills of which the titles gave no intimation, and which might, therefore, be overlooked and carelessly and unintentionally adopted; and *third*, to fairly apprise the people, through such publication of legislative proceedings, as is usually made, of the subjects of legislation that are being considered, in order that they may have an opportunity of being heard thereon by petition or otherwise, if they shall so desire. The general purpose is accomplished when the law has but one object, which is fairly indicated in the title." Cooley, C. L. 143, 144.

"The intention is, that the title shall state its object according to the understanding of reasonable men." 5 A. 94; 6 A. 605.

"A provision, hidden under a mass of verbiage of a statute, relating to an object entirely different, is almost inoperative, unless among the few whose business it is to read statutes." 5 A. 94, State vs. Hackett.

The instances in which acts, or portions of acts, passed in this State in disregard of this constitutional requirement, which is mandatory, are not scarce. See 11 A. 722, 736; 5 A. 94, Duverge vs. Salter; 14 A. 7, Williams vs. Payson; 23 A. 720; 21 A. 479; 25 A. 598.

It is a principle, universally recognized, that laws in derogation of common right, are to be strictly construed,

and can not be extended beyond their clear and precise import, so as to reach persons, cases, or things, other than those they legally and specifically embrace. Of this character are those laws which are designed to substitute a mode of procedure in derogation of the ordinary rules of practice. 12 A. 769; 9 A. 233.

An act of 1848, "to give jurisdiction to the district courts of New Orleans over causes arising under Act 3d March, 1819, respecting landlords and tenants," was held to be unconstitutional. The object of the act was to subject tenants to *summary* proceedings. This was not expressed in the title, which gave no intimation of such provision in its contents. Duverge vs. Salter, 5 A. 94.

An act of 1870, "to provide a revenue, to levy and collect taxes, to grant and collect licenses," etc., contained a section, 57, directing the institution of *suits* before the Third District Court for the Parish of Orleans, there to be tried by preference. The court held that the title, being silent on the question of the extension of the jurisdiction of said court, the section was unconstitutional. State vs. Church Wardens, 23 A. 720.

An act of 1873, "to enforce the payment of taxes due the State, providing for the seizure and sale of the property of delinquent taxpayers, and regulating the proceedings against them and their property and tenants," was considered, as not declaring, in express terms, that a purchaser would be put in possession, *without notice* to the delinquent taxpayer, and as adopted in reference to the general laws relating to *summary* proceedings in the courts of the State, and as authorizing the district courts to require the necessary legal notice to be issued to the party to be ousted, and to dispose of the contest in a *summary* manner. 27 A. 704.

In a suit brought by a purchaser, under a tax collector's title, made under the provisions of Act 105 of 1874, the property having been adjudicated under the act of 1873,

the proceeding for possession was by *rule*. This court affirmed the doctrine in 27th Annual, saying that the proceeding authorized is a *judicial* proceeding, with all its incidents and characteristics, and that it must be governed by the general rules applicable to such proceedings, which, in the absence of any contrary direction, are to be commenced by petition and citation. C. P. 170, 171; Fischel vs. Mercier, 32 A. 707. This ruling was affirmed in a number of cases, not yet reported.

In Wisner vs. Mayor, 25 A. 598, it was held that, under an act of 1868, purporting to amend the first section of a statute of 1866, which was an act of incorporation, the amendments not being covered by the title, are null and void, because of a violation of Act 114.

We will now proceed to apply those principles to the case before us.

It is claimed that the judgment relied upon by the city is a valid judgment, binding *personally* upon Irwin, who was living when it was rendered, and that payment of it must be enforced out of the mass of his estate, regardless of the manner in which it was, or may still be, secured to some extent, by lien on the real estate in the drainage district.

The defense is, that the judgment is, on its face, a nullity, because not preceded by the formalities required by law to serve as a basis for the rendition of judgments.

The act, under which it is claimed that the judgment was rendered is Act 30 of 1871, which incorporates Act 57 of 1861, providing for the collection of the assessment for draining under acts of March, 1858 and 1859, by certain *summary* and unusual proceedings. That act of 1871 is entitled: "*An act to provide for the drainage of New Orleans.*"

The portion of the act relied upon as authorizing the proceedings in which the judgment was rendered is section 9, which relates mainly to the duties of the three

former Boards of Drainage Commissioners and to those of the Board of Administrators of the City of New Orleans. It directs, by PROVISO, that said board shall *make assessments* of two mills per superficial foot in those parts of the three districts as existing under, and created by, the act of March 18, 1858, and of March 17, 1859, and amendments thereto, and on such lands as are brought within the protection levees contemplated by this act where no assessments have been made, and *execute and enforce* the same, as provided for by the several acts of the Legislature creating and regulating said Boards of Draining Commissioners.

The proceedings in which the judgment asserted by the city was rendered appear to have been conducted under the provisions of the act of 1861, which, it is insisted, forms a part of it, by the general reference made therein to drainage tax collection laws. No process whatever of the court appears to have been *directed* to Patrick Irwin and *served* on him in person, or at his domicil. The only notice which is claimed was issued, and which is said to be binding on him, is the advertisement published to announce the deposit of the assessment roll in court, and to make demand of payment. This notice is addressed to "*Drainage Taxpayers.*"

If it be true, as is claimed by the city, that by section 9 of Act 30 of 1871, the city administrators were authorized to create the fourth drainage district, as they have done by ordinance, to levy taxes for drainage purposes on property within its limits, to deposit plans in the mortgage office and assessment rolls in a district court, as was authorized to be done by the acts of 1858, 1859, and 1861, in relation to the first, second, and third drainage districts, the delegation of such powers or authority was of momentous importance, and the objects in view, being of significant magnitude, should have been expressed in the title of the act, which is manifestly reticent on the subject.

A reading of it suggests no other idea than that the Legislature designed to provide for *the* drainage of New Orleans. The *article* used refers the mind to a state or condition of things in existence at the time of the adoption of the act, which was: *the drainage* of New Orleans as *it then was organized;* and, also, to some additional legislation relative to it. It can not be claimed that the title is expressive of the creation of a new drainage district, and still less of the institution of *extraordinary proceedings* to coerce payment of drainage taxes. This last conclusion is irresistible, when it is considered that the laws referred to, for the levy and enforcement of such taxes, are those creating and regulating the Boards of Drainage Commissioners, passed in 1858 and 1859, which are silent on the subject of the mode of collection, so much so that the act of 1861 had to be enacted to provide for the unusual and *summary* proceedings which it authorizes.

If this last act was then deemed essential, and no doubt it was, to authorize exceptional and summary proceedings for the collection of the tax provided for by the acts of 1858 and 1859, as concerned the three districts thereby created, it is manifest that a similar act, or similar provisions, were likewise indispensable for the purposes, which it is said the act of 1871 contemplated. No person of reasonable understanding, on reading the title of the act, could have ever suspected that the authority claimed had been delegated; no property owner could have fairly supposed that the title covered and sanctioned against him *summary* proceedings for the collection of the drainage tax, even if one were to be levied. The title is clearly deceptive, and does not express the objects which it is insisted it does.

There being, then, no law providing for the institution of the summary and unusual proceeding, upon which rests the judgment relied upon by the city, the unavoidable

consequence is, that the tax claimed can not be recovered and that the judgment asserted is an absolute nullity; and, therefore, that the opposition of the City of New Orleans must be rejected.

This view of the case dispenses us from considering the numerous and plausible objections raised by the executors to show that the judgment, in any event, could only be one *in rem*, and in no manner *in personam*, for a purely *real* obligation to be satisfied *exclusively* out of the property burdened.

The opposition of Palmer, which hinges upon that of the city, necessarily drops with it, as the warrants could be satisfied *only* out of the tax claimed.

Constitutional amendment of 1874.

V. The opposition for city taxes was not sustained. The court considered that payment of the same had been established. The city has asked no amendment of the judgment, which, therefore, must remain unaltered.

VI. The next opposition is that of the asylums. The opponents aver that Patrick Irwin has bequeathed a debt due him from St. John's Church, on Dryades street, in this city, the same to be divided equally between the Catholic Bishop of New Orleans for one-half, and the Catholic Orphan Asylums of New Orleans for the other half. The executors hold that this legacy was *revoked* by the testator when he received from the diocese of New Orleans, which owed him the debt, and to whom he looked for payment, bonds of the diocese for the amount of the debt, and when he surrendered the original evidences of the debt mentioned in the will. It appears that the bonds, amounting to ten thousand dollars, were inventoried, and are, in kind, in the hands of the executors.

The Code says, Art. 1691: That a revocation is tacit when it results from some other disposition of the testator, or from some act which supposes a change of will. It provides further, Art. 1695, that a *donation inter vivos*, or

a *sale*, made by the testator of the whole or a part of the thing bequeathed as a legacy, amounts to a revocation of the testamentary disposition for all that has been sold or given, even though the sale or donation be null, and the thing have returned into the possession of the testator, whether by the effects of that nullity or by any other means.

It is clear that, in such cases, the act of the testator, by *parting* with title to the thing, must be taken as a manifest intention to revoke the disposition made of the same thing in his will. 5 Demol., Don., § 221.

When Irwin surrendered the former evidences of his claim, and accepted in exchange the bonds of his debtor, he did not part with his claim. The original obligation remained, and underwent no material modification, save in the form of the evidence of the same. 32 A. 826; R. C. C. 2190; Pothier, Obl., § 559.

It may be that in France, owing to the provisions of Art. 1038 C. N., which is not to be found in our Code, and, therefore, which was purposely left out, and which contemplates an alienation by exchange, the question might have presented some difficulty to the minds of those who might consider that the *change* of the *evidence* of a claim is an alienation of it, by exchange of itself for itself. 5 Demol., Don., 211, 212; 4 Troplong, Don., 2095.

The evidence shows that there are ten Catholic Asylums in the City of New Orleans. On the assumption that there are no more, the opponents, being four in number, would be entitled to two-fifths of the legacy, but their interest can not now be adjusted.

It is, therefore, ordered, adjudged, and decreed that, in so far as it sustains the opposition of the City of New Orleans, by placing it on the account for $5,867.20, and dismisses the oppositions of the asylums, the judgment appealed from be reversed; that, in so far as it overrules the exceptions to the jurisdiction and the pleas of prescrip-

tion, and does not allow the claim of the city for $358.50, and for city taxes, and that of Palmer, it be affirmed; and proceeding to render such further judgment as should have been rendered by the said court.

It is ordered, adjudged, and decreed, that the oppositions of the City of New Orleans and of E. C. Palmer be dismissed, and that the oppositions of the asylums be sustained; but that, as to them, the case be referred to the Civil District Court for the parish of Orleans, which has superseded the late Second District Court, and which has jurisdiction over the settlement of the succession of the deceased, for further evidence on the measure or proportion of interest of the opponents in the legacy mentioned; that when such measure or proportion shall have been ascertained, the said executors do deliver said legacy to the legatees thereof in execution of the will of the deceased.

It is further ordered, that the judgment appealed from, thus amended, be affirmed, the costs of appeal and of the lower court, on the opposition of, be paid by the City of New Orleans, and those on the opposition of the asylums be paid by the succession.

Levy, J., absent.

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ON APPLICATION FOR REHEARING.

BERMUDEZ, C. J. We understand the application for a rehearing as claiming that we have committed *two* manifest errors:

*First*, when we said that we did not find in the transcript of appeal before us the judgment for the drainage tax on property in the first district for $358.50.

*Second*, when we ruled that the *summary* proceedings in which the judgment for a similar tax on property in the fourth district was obtained for $5,867.20, and which it is said constitute part of the objects of Act 30 of 1871, were not expressed in the title of that statute.

1. We reiterate and affirm that the judgment for $358.50, said to have been rendered for the drainage tax in the first district, is not to be found in the transcript of appeal made in the succession of Patrick Irwin. But we are told in the brief for a rehearing, and *for the* FIRST *time*, that this judgment and the proceedings upon which it is predicated, are to be found in the transcript bearing No. 4,338 of the docket of this court; that the judgment and proceedings were introduced in evidence in the lower court; and that, concerning them, is to be found at p. 178 of the transcript before us the following entry:

"It is agreed, that the transcript in the Supreme Court of that case, already copied, shall serve in case of appeal."

It is to be remarked that neither the title of the case, nor the number, nor the date of filing of the transcript alluded to, is given in this entry, and that the numerous and voluminous briefs submitted on the merits by the opponents, do not mention that entry, and nowhere specify the title or number of the case *in this court*, the transcript whereof was to serve in case of appeal.

The Code of Practice, Art, 585, provides that after an appeal has been allowed, and the surety given, the clerk of the court from whose judgment the appeal is taken, shall make a transcript of all the proceedings as well as of all the documents filed in the suit, in order that the same be delivered when demanded. In furtherance of the authority delegated by law, this court has adopted rules directing the manner in which such transcripts should be prepared for transmission.

For the purpose of lessening costs and expediting business, this court has thought itself justified in abstaining from a too rigid enforcement of the law and of those rules, by tolerating a moderate relaxation in permitting parties to eliminate from the transcript useless and cumbersome documents and papers, and to dispense from incorporat-

ing into it the record of cases introduced in evidence in the lower court, when there exist transcripts of the same in this court; but such sanction has always been treated as confined within reasonable limits, and as one which, in practice, was to be used with discretion. The actual court, for the greater relief of litigants, has itself authorized such consents, saying that it would be uselessly, nay, injuriously onerous, to require a new complete transcript of the whole voluminous record of the lower court, when large portions of the same are on file in this court, 32 A. 563; but we have subsequently announced that parties venturing to try their cases on transcripts KNOWN to be defective, did so at their risk and peril. Bacas vs. Smith, not yet reported.

It is the jurisprudence of this court on this subject, that where, by agreement, the parties have the right to refer in the Supreme Court to a record already filed therein, offered in evidence below, and which is not embodied in the transcript, and where reference is made, *neither* to the title nor to the number of such record, this court will not assume the inconvenience and make it their duty to hunt up among its archives for records to which allusion may have been made, nor to tax its memory with appeals previously decided. Such defects can not be remedied on applications for a rehearing. 10 L. 514; 9 A. 292; 14 A. 67. Had counsel seasonably and properly made reference here to the transcript alluded to in the "stipulation" entered into in the lower court in *general* language, the unpleasant consequence which has followed would have been easily avoided. For such omissions and results parties litigant have none to blame but themselves.

The executors insist, in their brief filed in answer to the application for a rehearing, upon the enforcement of those rules of practice, and thus leave us no discretion on the subject.

2. We have held that the title of an act, entitled "*An*

*Act relative to the drainage of New Orleans,*" was not expressive of *summary* proceedings for the levy and collection of the drainage tax claimed, and, therefore, that *such* proceedings, in which the judgment relied upon was rendered, being unauthorized by law, were nullities, and that the judgment itself was, therefore, of no binding force and effect.

We found in the body of the act no authority for the creation by the Council of New Orleans of a new drainage district, and encountered none but the vaguest mention for the making of assessments, for the execution and enforcement of the same, on property not situated in the original three districts.

It is insisted, however, that by section 9 of that act (No. 30 of 1871) the city administrators were authorized to make assessments on such lands as were brought within the protection levees contemplated by the act, where no assessments had been made, and to execute and enforce the same, as provided for by the several acts of the Legislature creating and regulating the Board of Drainage Commissioners.

It is true that the tenor of the act is to that effect. It is possible, nay, probable, that the desire, the intention, was to engraft upon the act of 1871 the provisions of the act of 1861, which was passed for the very purpose of authorizing *summary* proceedings for the collection of drainage taxes, assessed under the acts of 1858 and 1859; but it is patent that the desire was not realized, that the intention was not expressed, and that the deficiency can not be supplied by judicial action. The acts to which reference is made by the 9th section, are the two last acts, which are *the* only acts "creating and regulating the Board of Drainage Commissioners." The reference is not levelled at and does not, in terms, propose to include the act of 1861 (No. 57), which is not an act creating and regulating those boards, but which is an act to provide forthe col-

lection of drainage assessments under the acts of 1858 and 1859. It was adopted for the express purpose of providing for *exceptional* remedies previously unknown to the law.

But, had the act of 1871, instead of the surreptitious reference which it vaguely makes, boldly embodied, *mutatis mutandis*, the solitary and lengthy section of the act of 1861, it could not be justly claimed that such portion of it, an important and vital element or object, was *germane* to the subject matter in view, as is announced in the title.

Where the power to levy a tax is conferred, the power of collecting it, being germane, follows, but that power does not necessarily include the right to have recourse, for the purpose of collection, to *summary proceedings* of unusual harshness and rigor. It only implies a right to resort to *ordinary* process. The complaint is against the *summary* character of the proceedings.

The constitutional provisions, Federal and State, which guarantee due process of law to every citizen for pleading and impleading, secures to litigants the unconditional and absolute right of a legal notice and trial before judgment, however given, provided it be authorized by a *valid* statute. The forms of such notice are determined, as a rule, by the *general* laws, but, as an exception, by the *special* laws of the land.

Had the judgment insisted upon been obtained in the *regular* course of *ordinary* proceedings, no complaint from the defendants, in the process, could be entertained *on* the question of *form;* but as it was procured in the irregular course of *exceptional* proceedings, the question arose, and was determined, whether such proceedings were authorized and sanctioned by a *valid* statute.

An author of recognized distinction says:

"It is a well settled and wholesome rule, that statutes authorizing *summary* proceedings, and by which extraordinary powers are given to courts, or officers of justice,

are to be strictly construed;" * * "that all statutes conferring special ministerial authority, by which any man's estate may be affected, must be strictly construed." Sedgwick, 274, 275, 300, 302.

Long since, the jurisprudence of this State has settled, that laws substituting a fictitious or constructive citation to that which is required by the *general* law, and which is the essential *sine qua non* foundation for the validity of judicial proceedings, are in derogation of common right, and must receive a rigid construction. H. D. 785; 7 A. 76; 8 A. 19; 9 A. 368; 13 A. 268; 14 A. 658; 8 A. 365; 9 A. 233; 10 A. 764, 767; 8 N. S. 325; 11 A. 338; 12 A. 751; 13 A. 455.

It is perfectly true, that the forms of a citation and of judicial proceedings fluctuate with the legislative will, and are entirely within its control and discretion. The usual form of proceedings resorted to is the *rule*, while the unusual form is the *exception*. Exceptions to the ordinary forms have been made, and properly, too, for the prompt liquidation and enforcement of certain claims, prominent among which are those due the State, and those due municipal corporations; but such exceptions are unequivocally provided by valid special legislation, announced in titles expressive of the same. The Act of 1861 itself, under which the drainage tax for the first district is claimed to have been reduced to judgment, is an illustration of such special legislation for the collection of drainage taxes assessed on property in the drainage districts in existence at its passage; although it has been mooted whether its title is expressive of the summary proceedings for which it provides.

Whether the formalities mentioned in the Act of 1861 were or not complied with, is a question with which we have not dealt, for the reason that such compliance was immaterial, inasmuch as we thought that the existence of this portion, or object of the act, was not expressed, or

even indicated in the title, which seems to contemplate but *one* object—" the drainage of New Orleans."

Whatever may be encountered in the body of the Act of 1871, relative to *summary* proceedings for the collection of the drainage tax sought to be recovered as against property in the fourth drainage district, must be considered as unwritten, and, therefore, as not justificatory of the proceedings instituted as a basis for the judgment declared upon, which is, consequently, an absolute nullity, and not susceptible of enforcement. *Non observata forma, infertur adnullatio actus.* 2 Just. 388; Dwarris, 611.

While considering the meaning of the title of the Act of 1871, we took occasion to subject the language used to a slight, and, perhaps, immaterial, verbal criticism, declaring that we thought we found in it a reference to a *definite*, and not to an indefinite drainage of New Orleans, viz: that in existence at the date of its passage; deeming that, in so saying, we were, as we are, supported by the nature of the contents of the law. In doing so, we do not perceive that we have transgressed the recognized rules by which the import of human language is tested in order to be correctly measured and properly comprehended; but, even if we were mistaken—philologists will differ—the error is of no practical moment, as the emphasis or accentuation complained of does not necessarily enter in the determination of the question passed upon.

We attach no importance to the argument advanced for the *first* time in the brief on the application for a rehearing, that the Act of 1871 became in 1874, by the constitutional amendment of that year, part of the State organic law. If that were so, and on that question we express no opinion, its incorporation at that time in the Constitution could no more have a retroactive effect than could be claimed for statutory legislation.

The general doctrine is, that constitutions are to be expounded in the same way and according to the same rules

as statutes. Bishop on St. Cr. § 92; 7 Md. 135; 5 Ind. 557; 5 Md. 337.

The general rules of interpretation are the same, whether applied to statutes or constitutions. Sedgwick, Constr. 19.

We are aware of no reasons applicable to ordinary legislation which do not upon this point apply equally well to constitutions. Cooley on Const. Lim. 63; 3 Ind. 258; 21 N. Y. 12; 10 O., N. S. 588.

This principle is not only applicable to legislative acts, but to State constitutions. Wade on Retroactive Laws, § 37, § 8, and authorities in note.

If the Act of 1871 was embodied in the Constitution, in 1874, and *then* acquired vitality, the inference necessarily is, that previous to such incorporation, it was a lifeless form, as far as it provided for *summary* proceedings for the collection of the tax in the fourth district. It could operate prospectively only, and could not affect, so as to vivify and validate a judgment previously rendered, and which was a nullity. The Constitution of 1868, article 110, provided distinctly against the adoption of *retroactive* laws; and it can not be supposed that the constitutional amendment of 1874 was designed to act retrospectively in contravention of the rule thus prescribed. When so saying, we do not wish to be understood as meaning that a constitution can not validly contain retroactive provisions which do not impair the obligations of contracts.

Last. The proposition lightly advanced, that the rights of the other opponent, Palmer, as a warrant holder, have been impaired by our judgment, can hardly be considered as a serious one. He has not verified by proof his averments of fact, and has no foundation upon which to stand. The constitutional prohibition against the passage of laws impairing the obligations of contracts is no protection for him. He has shown no contract, no interest in any contract; has shown no impairment of the obligations of any contract in which he may claim to be concerned. If war-

rants have been issued by a municipal corporation, or otherwise, under a State law, which is pronounced by the State judiciary as unconstitutional under the State Constitution, parties who have dealt in such securities have done so at their risk and expense, and must stand the consequences of their acts.

To declare otherwise than we have, would be to eliminate the constitutional safeguards which were so providently secured against improper legislation, for the administration of law, justice, and equity, for the protection of the rights and prerogatives of the people against oppression by the few. We think that we have discharged our duty, and we are unwilling to change our views and our decree. Acting otherwise, would be doing an arbitrary act.

Rehearing refused.

## EXHIBIT O.—Continued.

No. 8260.

HENRIETTA DAVIDSON, EXECUTRIX, ET AL., VS. CITY OF NEW ORLEANS. JOHN CROSLEY & SONS, INTERVENORS.

A judgment for a drainage tax will not be enforced, where it is shown that the property, far from being benefited was injured by the alleged drainage. The consideration of the judgment, which was prospective, having failed, the eventual debtor is, in law and equity, entitled to relief from the judgment. Drainage warrant holders depend for payment upon the collection of drainage taxes legally due and exigible, and can not be paid out of any other fund.

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REPORTED IN 34TH LA, ANNUAL REPORTS, P. 170. CITED R., P. 24.

Appeal from the Civil District Court for the Parish of Orleans. Rightor, J.

H. N. Ogden and B. R. Forman, for plaintiffs and appellees.

Lacey & Butler, S. P. Blanc, for defendant and intervenors, appellants.

The opinion of the court was delivered by

BERMUDEZ, C. J. The object of this suit is to render inoperative a judgment for a drainage tax, and eventually to regulate its effect.

The conspicuous features of the case presented by the record are the following:

In January, 1875, a judgment was rendered on appeal, by the Supreme Court of this State, then in existence, reversing that of the lower court, and approving and homologating the assessment roll presented in 1871, by the commissioners of the *first* drainage district, the approval and homologation to operate as a judgment against the property described, as assessed in said roll, and also

against the owner or owners thereof, with 10 per cent. in addition to the amounts assessed, to pay costs and counsel fees. 27 A. 21. This judgment was affirmed by the Supreme Court of the United States, who did so, saying that there was no error in the judgment of the Supreme Court of Louisiana, of which it has cognizance. 96 U. S. 96.

A piece of rural property, known as the "Allard Place," was mentioned on said roll as belonging to John Davidson. A tax of $40,253.85 was assessed upon it, as due for the drainage of the same.

Upon the complaint that the City of New Orleans, which had by law succeeded the commissioners, was about to take steps for the satisfaction of that claim, out of said property and of other property of theirs, and that said judgment had ceased to have any vitality, for reasons stated, and could no longer be enforced, the widow and executrix, and the heirs of John Davidson obtained an injunction arresting the writ, and prayed that it be perpetuated; that it be decreed that the City of New Orleans has no legal claim on any of their lands for drainage; that all inscriptions therefor be canceled, and if this relief be denied, that said claims be restricted to the specific property upon which it was assessed, and not to be a *personal* debt against any of them.

The city filed exceptions to the jurisdiction of the court, and pleaded *res judicata* and no cause of action.

On appeal from a judgment dismissing the suit, this court disposed of the exception to the jurisdiction and no cause of action, and reserving the right of defendant to reiterate the other plea, and set up other defenses, remanded the case. 32 A. 1245.

Upon the remanding, the city renewed the plea of *res judicata*, and asserted the impairing of the obligations of a contract, alleged to have been formed, touching the levy, collection, and application of the drainage tax claimed.

John Crosley & Co., representing themselves as owners of drainage warrants, $688,695, whereof $368,695 issued under Act 30 of 1871, and $320,000 under Act 16 of 1876, of the General Assembly of this State, intervened in this suit. They claim that the warrants were issued with due authority, for legal consideration, and are secured for payment under the statutes which constitute a contract, the obligations of which could not be, and were not, legally impaired by any act of the State.

They claim no judgment, either against the plaintiffs or against the city.

From a judgment in favor of plaintiffs, the defendant and the intervenors have appealed.

The grounds upon which plaintiffs seek relief appear to be six in number:

1. That all of petitioners' land in the first drainage district, between the Mississippi River and Metairie Ridge, having been drained, and the expense of the drainage having been paid under the drainage statutes of 1835, 1839, the subsequent assessment, under the act of 1858, merged into the judgment enjoined, and is not legally exigible.

2. That by Act 165 of 1858, the assessments for draining any one section or district could not exceed $350,000, and payments of drainage tax having been made in excess of that amount, there is nothing due and exigible under the judgment aforesaid.

3. That the tax levied and imposed in the first drainage section for drainage purposes is greater in amount than the benefit to be derived by the owner of the assessed property from the drainage work; taxation accompanied by such result is tantamount to confiscation, and, by reason thereof, the tax is violative of the fundamental law, and so void.

4. That the drainage acts passed in 1858, 1859, and 1861, and Act 30 of 1871, levy and impose a drainage assessment not equal and not uniform, and, therefore, are

violative of the Constitution of Louisiana, in force at the time when those laws were enacted.

5. That the drainage work for which the tax underlying the judgment in controversy was rendered, has not been done, and that the scheme has been abandoned; that such abandonment works a cancellation, both of the drainage tax and of the judgment for the same, herein enjoined.

6. That the drainage assessment against the property of their author, John Davidson, and the judgment obtained therefor, have been released by Acts 48 and 67 of 1877, and Act 147 of 1878, of the General Assembly of the State.

In defense, the city pleads, that all these grounds, with the exception of those which relate to the non-performance and abandonment, and to the release mentioned, were advanced in the opposition filed by the succession of John Davidson, represented by his executrix, to the proceedings for an homologation of the drainage tax assessment roll or tableau; that they were directly passed upon by the Supreme Courts, both of Louisiana and of the United States, and that such judgment constitutes *res judicata;* that even if these grounds had not been specifically and fully set forth, they should have been thus alleged, as they then existed and could have been set forth, and that they can not be propounded after judgment.

The City of New Orleans further pleads and argues, as concerns the additional defense of abandonment and release, that the work was done, as far as practicable, that there has been no abandonment on the part of the city, but merely a temporary suspension of operations, wholly occasioned by the fault of the property owners, in not paying their drainage tax; that an actual abandonment by the city would not have the legal effect of relieving the tax payers of the drainage assessment and tax; that at the time of the pretended abandonment, the Mississippi and Mexican Gulf Ship Canal Company and its transferees,

and the holders of warrants issued by the company, had acquired a vested right to the entire tax levied in the four drainage sections; that such pretended abandonment, if supplemented by a release of the property owners from a payment of that tax, will impair the obligation of a contract, and divest the valuable rights thus vested in the company and the parties referred to, and consequently, that the alleged abandonment and the pretended cancellation of the drainage assessment must be treated as in violation of the fundamental law, and so, absolutely void.

From the view which we have taken of the merits of the controversy, from an independent standpoint, we do not think it necessary to pass upon the defense of *res judicata*. If it were sustained, the first four grounds relied upon by the plaintiff could not be considered. If it were overruled, we would not adjudicate upon their sufficiency for relief, as there exists another ground upon which we can satisfactorily rest a decision of the case before us.

The same view dispenses us from determining whether the judgment enjoined can or not be construed and regulated in its effect, so as to be restricted in its enforcement to the property on which the drainage tax was assessed, and from which it is claimed that it should primarily be paid; in other words, whether the judgment be both real and personal, or real only.

For the same reason we are relieved from the obligation of considering and determining the effect of Section 12, of Act 165 of 1858, as well as that of Acts 48 and 67 of 1877, and of Act 147 of 1878, invoked by the plaintiffs for their further protection.

Conceding, for argument's sake, that the first four grounds of the petition, and all other causes of complaint, which existed and could have been set up at the date of the opposition to the drainage assessment roll, have been adjudicated upon, and that the judgment rendered consti-

tutes an insuperable objection to their being again agitated, it does not at all follow that the judgment is one which necessarily must be executed, or one which can not be nullified—that is, declared inoperative and of no effect; in other words, paralyzed, as though it were a nullity.

It is worthy of note, that in the opinion rendered in 27 A. 21, the court expressly refers to the memorable decision in 11 A. 370, which both parties from different standpoints invoke as a shield in this litigation for their respective protection. That opinion contains a most material reserve, which leaves a wide door open for resistance to the judgment in question.

This suit is to have that judgment declared inoperative, because of what has occurred since it was pronounced, and which could not have been pleaded *before* it was rendered.

As was said in our previous opinion: "It is easy to conceive that * * * cases may arise in which causes occurring subsequently to the rendition of judgments may render their execution illegal and inequitable and violative of rights not within the contemplation of the court when the judgment was rendered, and not intended to be foreclosed thereby. Examples are suggested of eviction of the vendee after judgment for the price, or eviction of a tenant, or destruction of leased premises, after judgment for future rents, and such examples might be easily multiplied. Here would be failure of the only possible consideration of such judgments, and it could not be doubted that such failure would furnish just ground to enjoin their execution." See 13 A. 249; 3 A. 646; Story's Eq. § § 887, 889.

In its wisdom, the Spanish law, once in force in this State, but the spirit of which has survived intervening changes, and still abides with us, expressly provides for such contingencies on the subject of *res judicata*. It declares that, if the parties have appealed from the judgment and it is confirmed by the sentence of a competent

superior tribunal, they shall be bound forever by it thereafter; yet if anything should happen to destroy its force, it will cease to have effect, either against the parties or their heirs." Partidas 3, Tit. 22, Law 19.

This principle is necessarily inherent to all legislation, particularly where the consideration of the judgment is prospective and must have enured, as a condition precedent, to its execution or enforcement.

In the case in which the judgment invoked as constituting *res judicata* was rendered, the court formally declared that the constitutional questions raised had been decided in 11 A. 370.

Referring to the opinion in that celebrated controversy, we find that the court there used the following language:

"We have not understood from counsel, that there are cases in which the property has not been so far benefited by the work done as to be increased in value more than the cost of the work assessed. Were not this the case, the property of each proprietor, to the extent of the difference between the increased value and the cost of the work assessed to him, would be taken for a purpose of public utility, without adequate compensation previously made, and consequently there would be a violation of Article 105 of the Constitution."

Now, in the present controversy, it is claimed that the sole consideration of the judgment at stake was the prospective benefit to accrue by the contemplated execution of the projected work and the consequent enhancement of value of the land, to the extent at least of the amount levied upon it; that whatever work has been done by the commissioners or the city, has been a detriment rather than a benefit to the lands of plaintiff; that the work has been abandoned, and that there is no probability that it will be resumed: that whatever taxes might be collected would go, not toward the completion of the scheme, but to the satisfaction of the warrants in question; that all the

labor expended in the first drainage district has been paid for; that there are no drainage warrants outstanding for the work said to have been executed in the first district, except for the insignificant sum of $450; that the judgment of homologation was of the tableau for the *first* drainage district, the proceeds applicable to the same; that the claim of intervenors is under warrants issued for liabilities of other districts, and finally, in substance, that the consideration of the judgment having failed, it can not be enforced.

We have considered the statements which the district judge has systematically made of facts found by him; we have compared it with the oral and written evidence introduced on the trial of the case, and we find that the averments made by the plaintiffs are established, touching the absence of any benefit derived from the contemplated drainage: injury sustained in consequence of what work was done; the nature and condition of their property, which is almost entirely and always under water; a place of resort for water fowl, hunting, and fishing; the absence of any outstanding warrants for work of any kind done in the *first* drainage district, except for a small amount; the abandonment of all drainage work; the disposal of all drainage apparatus; the impotency of the city to resume the enterprise; the value of the property on which the tax is assessed, which is shown to be at best one-tenth of the amount of the claim, with charges superadded.

In presence of such a state of facts, can it be insisted, in good conscience and in equity, that the judgment enjoined shall be enforced?

In answer, we are confronted with the saying of our immediate predecessors, in the case of the Canal Bank vs. New Orleans, 30 A. 1376, wherein they asked whether if they were to consider, as conclusive evidence, the declarations contained in the Acts of 1877, that would be sufficient to establish that the work contracted for and

done, has not been performed at all, or not performed according to the terms of the contract, and that every outstanding warrant given, as the price of that work, is without consideration?

In answer to the formal question put by themselves, viz: "Would those declarations, if taken as evidence, be sufficient to justify the court to pronounce in this suit, that, in whosever hands those warrants may have passed, * * * they are invalid and void, worthless, as to the creditors, binding on no one, and that every guarantee, mortgage, and privilege, securing their payment, must be canceled, erased, and destroyed?" they have answered: "*we think not.*" 30 A. 1376.

The suit wherein this language is found was one in which the plaintiff was asking the *reimbursement* of a sum of money paid without compulsion as a drainage tax. The ground for repetition was want of consideration and subsequent release from the tax and all liability, by the legislation of 1877, previously noted. The court did not stop there. They ended the opinion by saying: "We conclude that plaintiff has not shown that its drainage taxes were levied and paid without consideration, and that it was shown, in so far as defendant is concerned, that said taxes were voluntarily paid and properly disposed of."

The warrant holder who had intervened was dismissed, on the ground that as no judgment susceptible of being rendered could affect him, he had no foundation upon which to stand, and therefore no interest to assert and to protect in that litigation.

The putting and the answering of the question were uncalled for. The matter was not discussed. It was not necessary to consider it at all for the determination of the issue presented, which was simply the return *vel non* to the plaintiff of a sum of money willingly paid as a drainage tax—the ground of repetition being, as already ob-

served, want of consideration. The language used on the occasion must, therefore, be taken merely as *obiter*.

Under the authority in 11 A. 370, which underlies the rulings in 27 A. 21, we are of a different opinion, and consider that where the consideration of a judgment is prospective and has failed, the eventual debtor is, both in law and in equity, entitled to relief and the consequent exoneration.

That authority and the conclusions to which we have arrived are supported by text writers and a long line of decisions, in a number of our sister States, declaring assessments void, because the benefit to the property *could not be seen and traced*. In all the cases in which it was clear that the district had received no benefit, the courts have, without hesitation, interfered on this subject. Mr. Cooley, in his work on *Taxation*, says:

"The levy is made on the supposition that the estate, *having received* the benefit of a public improvement, ought to relieve the public from its expense. In such a case, if the owner can have his land taken from him, for a *supposed* benefit to the land, which, if the land is sold for the tax, it is thus conclusively shown he has not received, and he then be held liable for the deficiency in the assessment, the injustice, not to say the tyranny, is manifest." Cooley on Taxation, 471–3.

Judge Burroughs, in his treatise on the same subject, writes more pointedly:

"If there can be a personal assessment, or the owner can be made personally liable for the tax thus imposed, then we have the remarkable result that for a tax which is imposed on a lot of land, upon the theory that its pecuniary value *is increased* by the improvement, the lot may be sold, and if there is a deficiency, the owner may be required to pay it; or, in other words, for the benefit conferred on the property, the property may be confiscated, and the owner, for the privilege of having it confiscated, may be required

to pay a tax into the treasury of the city." Burroughs on Tax., p. 475, V.; also p. 38, § § 30, 39; p. 459, § § 145, 146, 147; pp. 466, 474; 31 Cal., 240, 254; 41 Cal., 525; 49 Cal., 546; 41 N. Y., 123, 126, 133; 36 Mo., 456; 50 Mo., 525; 56 Mo., 286, 356; 58 Penn., 320; 1 Gill., 480; 5 Gilman, 416; 59 Maine, 80; 3 Bush, 416, 423, 667; 4 Bush, 587; 34 Ill., 203; 24 Miss., 497.

Finding such to be the case in the present controversy, we concur with our learned brother of the district court in the conclusions which he has reached in favor of plaintiff.

As the judgment sought to be executed by the city has become inoperative, and so can not be enforced, as the claim of the intervenors hinges and is contingent upon that of the city, the unavoidable consequence is, that the intervention must fail with the main defense, asking the execution of the judgment enjoined.

We say, that the claim of the intervenors is based upon that of the city, for the reason which they themselves aver in their pleadings, and assert in argument, that, under the laws by virtue of which the warrants were issued, and also of the intervening constitutional amendment of 1874, they can only be paid out of the drainage taxes realized.

If the statutes and the amendments constitute a contract in their favor, it is one which, by its very terms, is subordinate to the collection of drainage taxes legally due and exigible.

Where no such taxes are demandable, the contract, whatever it be, and the rights averred under it, necessarily fall through.

There exists a marked disparity between the present case and that of the State *ex rel.* Martin vs. Police Jury, Caddo Parish, 32 An. 1022, to which our attention has been called by the learned counsel of defendant and intervenors.

In that case, bonds had been issued with legislative sanction, in exchange of scrips and evidences of parochial

indebtedness emitted for considerations, but without legal authority. They had been made payable by the parish in a manner indicated, but without restriction as to the source of payment.

Hence, on the refusal of the municipal authorities to levy the tax provided by the law, and asked by the bond holders, a *mandamus* was allowed.

In the present instance, if the warrants held and produced on the trial by the relators, for the amounts before stated, be legal and valid, under the statute of 1871 and that of 1876, and the constitutional amendment of 1874, the last act resting on the former and on the amendment, no provision of subsequent law has been referred to directing them to be paid in a manner different from that mentioned in the statutes and in the amendment.

The payment of those warrants is, therefore, to be regulated by the provisions of the authority under which they were issued, and that authority expressly confines it exclusively to a special fund, when realized, and if realized. It is to take place *only* from the drainage assessments or taxes, "and not otherwise." The payment was, therefore, to be completely hypothetical, contingent upon eventualities susceptible of happening or not, and was glaringly restricted by well defined limitation.

The want of analogy between the two cases is manifest, both as to the facts and as to the law.

While charging an impairment of their alleged contract, the intervenors can not be heard to ask to be permitted to assail and destroy its integrity by demanding over and above that which may have been covenanted. 33 A. 386.

Their contract, if it exists, and whatever it be, is the law controlling their rights.

It is, therefore, ordered and decreed that the judgment appealed from be affirmed, with costs.

Rehearing refused.

## EXHIBIT O.—Continued.

No. 7450.

IN THE MATTER OF THE BOARD OF ADMINISTRATORS, PRAYING FOR A RECOGNITION OF MORTGAGE, AND RECOVERY OF ASSESSMENTS IN THE FOURTH DRAINAGE DISTRICT.

In the matter of the Board of Assessors, etc., judgments obtained for drainage taxes, under the provisions of Acts No. 165 of 1858, and No. 30 of 1871, against property in the fourth drainage district, are nullities, having been obtained by proceedings unauthorized by law. Ruling in Succession of Patrick Irwin, 33 An. 63, affirmed.

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REPORTED IN 34TH LA. ANNUAL REPORTS, P. 97. CITED R., P. 24.

Appeal from Third District Court, transferred from Superior District Court for parish of Orleans. Hawkins, J.

Geo. S. Lacey, for the Board of Administrators, Appellees.

Alfred Grima, for A. Delavigne, Appellant.

The opinion of the court was delivered by

BERMUDEZ, C. J. The question presented in this controversy involves the validity, to a certain extent, of a judgment for a drainage tax, obtained under the provisions of Acts No. 165 of 1858, and No. 30 of 1871.

The appellant, Alfred Delavigne, in the rights of the Beaujeu Brick Manufacturing Company, claims that he is aggrieved by a certain judgment, rendered on March 15, 1873, homologating certain assessment rolls, embracing property then owned by said company, and now belonging to him; that such judgment is erroneous, and should be reversed and annulled, for the reason that it was procured, without due process, under a statute which is violative of the organic law.

The only objection really urged by the appellees to this

prayer is, that the defense of unconstitutionality, not having been raised in the pleadings in this suit, appellant is precluded from urging it now, with a view to obtain a reversal of the judgment appealed from.

It is conceded that such questions as the company might have presented upon appeal, may be raised by the appellant, Delavigne, but not a step further can he be permitted to go.

We do not understand that the appellant claims any greater right. The case, then, must be determined as though brought up for review by the company itself.

The judgment assailed was rendered against the property described and the owners named in the assessment roll, except as to the property owned by certain parties who had opposed the tableau, among whom the Beaujeu Brick Manufacturing Company is not to be found.

The judgment was, therefore, one rendered by default against the property of that company itself. It does not appear that the judgment was ever notified to the company.

In the matter of the Succession of Patrick Irwin, 33 A. 63, it was decided by this Court that the section of Act 30 of 1871, relied upon in justification of the proceedings herein, under the provisions of Act 165 of 1858, was unconstitutional and void, and consequently, that the judgment therein sought to be enforced against the estate of Irwin was a nullity and of no effect.

We find no occasion to question the correctness of that judgment, and consider, for the reasons given in the opinion in that case, that the judgment rendered against the Beaujeu Brick Manufacturing Company is likewise a nullity.

It therefore follows, that the Beaujeu Brick Manufacturing Company never was legally cited to answer the demand formed against it. The record does not show that it appeared in the lower court and presented any issue.

How then can it be claimed that the question of unconstitutionality, raised on appeal, not having been presented

in the pleadings, can not be set up and urged before this Court.

We view the company in the light of a defendant appealing from a judgment rendered without any previous legal citation, actual or constructive, without issue joined or appearance, and asking its reversal.

The answer of the judgment representative is, that the judgment is valid, because rendered under the provisions of valid laws. The reply of the company is, that the law relied on is unconstitutional.

Conceding, for argument's sake, the proposition of law advanced by the appellees to be well founded, it surely can not be invoked to apply to cases in which parties defendant have not been legally cited and have not joined issue.

*Lex neminem cogit ad impossibilia.*

The appellant complains of the judgment in so far as it affects the property assessed in the name of the Beaujeu Brick Manufacturing Company, now his property. He has no interest to attack the judgment in any other respect.

The appellees ask that "all their legal rights, if any they have, under the judgment of January 29, 1873, and the personal judgment of March 15, 1873," be expressly reserved to them.

Our decree is not intended to affect such rights.

It is therefore ordered, adjudged, and decreed, that the judgment of March 15, 1873, and signed on March 20, following, in so far as it affects the property assessed in the name of the Beaujeu Brick Company and appealed from, be annulled, avoided, and reversed; and proceeding to render such judgment as should have been rendered by the lower court.

It is ordered, adjudged, and decreed, that the application herein made on the 7th of February, 1873, for the homologation of the assessment roll of the fourth drainage district be, and the same is hereby dismissed, as far as

concerns the property therein assessed in the name of the Beaujeu Brick Company, without prejudice to the rights which the appellees may have, if any, under the judgment of January 29, 1873, and the so termed personal judgment of March 15, of the same year, against said company.

It is further ordered that the appellees pay costs of this appeal.

## EXHIBIT O.—Continued.

STATE EX REL. CANAL COMPANY VS. CITY ET AL.

No. 6677.

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REPORTED IN 35TH LA. ANNUAL REPORTS, P. 70. CITED R., P. 24.

BERMUDEZ, C. J. This is a proceeding for a *mandamus* to compel the City of New Orleans to budget and, by diverse processes, to pay a judgment claimed to have been legally rendered on March 20, 1873, in favor of the relators against the city for $65,956.75, with 10 per cent., $6,595.65 and interest, the consideration whereof was a drainage assessment of two mills per superficial foot on lands owned by the city within the fourth drainage district.

Numerous defenses were set up by the defendants, among which the invalidity of the judgment.

There was judgment for defendants, refusing the *mandamus*, and the relators have appealed.

In the matter of the Succession of Patrick Irwin, 33 A. 63, the validity of this very judgment was inquired into and passed upon.

It was declared to have been rendered without warrant of law and to be null and void as against the Succession of Irwin. This ruling in the subsequently decided case of Delavigne, 34 A. 97, was affirmed. We have no reason to question the correctness of the views thus announced:

The judgment propounded upon by the relators being a nullity, its payment by the city can be enforced neither directly nor indirectly.

Judgment affirmed.

## EXHIBIT P.

DECISIONS OF THE SUPREME COURT OF LOUISIANA, AND OTHER AUTHORITIES, CITED AT PAGE 56.

In Municipality No. 2 vs. New Orleans Cotton Press, 18 La. Reports, p. 24, Judge Martin said:

"Corporations in the civil law are considered as in a "continued state of pupilage; and their administrators as "the tutors of minors. Until very lately minors were en- "titled to relief in all cases in which they could show that "a proper defense had not been made for them. It is not "very clear that the same right does not exist in favor of "a corporation whose interests have been neglected by "its administrators. IN THOSE CASES THE CITY MIGHT "HAVE SACRIFICED ITS OWN RIGHT, BUT NOT THAT OF THE "PUBLIC."

In *Millaudon vs. the First Municipality of New Orleans*, 1 An. R. 215, where the evidence in the Record showed that much more important evidence existed, and was actually before the Court and within the power of the First Municipality, Chief Justice Eustis said:

"Those charged with the government of this munici- "pality and with the management of its important con- "cerns are not the parties in interest in this suit; it is the "tax paying inhabitants who are to be affected by its result. "Were the former alone concerned, we should be justi- "fied in leaving them to the consequences of their own "acts; but we can not consent to adjudicate finally on the "right of the latter in a case presented to us as this is."

In *Delabigarre vs. Second Municipality*, 3 An. 235, 236, where it was urged on behalf of the plaintiff that there was no danger of eviction, because a certain judgment in Gravier's case formed *res judicata* between the plaintiff and the municipality, Justice Rost said:

"One of the essential requisites to maintain the exception "tion *res judicata* is, *ut sit eadem causa petendi*. The "City, in *Gravier's* case, did not set up title to the bat "ture, but claimed it exclusively as a *locus publicus*, "under a dedication by *Gravier*, and the use of the pub- "lic ever since the establishment of faubourg St. Mary. "The plea now made presupposes the issue to be the "same in this suit. It waives, therefore, the exception "in the brief, that the defendants, having set up title in "themselves, are bound by that plea, and can not change "the nature of their defense. In conformity with the "views expressed in the case of *Millaudon vs. First Muni- "cipality of New Orleans* (1 An. 215), we would not in "any case of which we have the control be disposed to "hold the corporation responsible for the errors of their "agents in pleading or in defending suits; but here the "very ground assumed by the plaintiffs waives an in- "formality which might as well perhaps not have been "alleged, as the plaintiff herself had committed errors in "her pleadings which she rectified in the supplemental "petition."

In *Brown vs. Police Jury of Madison*, 4 A. 189, where the question of law presented was whether the plaintiff was bound to discuss the land upon which a certain levy had been made, before he could proceed against the parish, and the Court found that under the act of 29 the land was directly liable to the plaintiff, and that if he resorted to his remedy, the land would have been purchased by the Police Jury for a sum sufficient to pay him, and the privilege which he had would have thus inured to their benefit; Justice Rost said: "We think they can not be deprived "of this right. It is urged that the defendants have alleged "in their answer, that the remedies secured to plaintiff by "law were lost in consequence of the acts and omissions of "their officer, and that, under this judicial admission, the "plaintiff could proceed directly against the parish, as

" was done in the case of *Newcomb vs. Police Jury, etc.*,
" *4 Rob. 233.*

" The defense of the Police Jury was perhaps ill ad-
" vised. But the plaintiff has proved that it was un-
" founded, and that all the formalities required had been
" complied with. Considering that the Police Jury are
" nominal defendants, and that it is the tax payers of the
" parish who are to be affected by our decision, we can
" not hold them to allegations made in error by their
" agents. Millaudon vs. First Municipality, 1 An. 215."

In *Benham vs. Parish of Carroll*, 28 An. 353, suit had been instituted upon several parish warrants of the parish of Carroll, and the parish, through the District Attorney, answered, denying any indebtedness to plaintiff as set forth, and averring that the warrants sued on were issued without authority of law, and it was set up, that if the Police Jury had contracted any debt in favor of plaintiff or any former holder of the warrants, the parish was not bound, because the defendants creating the debt did not provide the means of paying the same; that no consideration for said warrants inured to the parish, and that they were procured by fraudulent combination between the plaintiff and the majority of the Police Jury. There was a judgment in favor of the plaintiff, and the parish appealed. Afterward a motion was made to dismiss the appeal, among other grounds, because the judgment was confessed in the lower Court by defendants.

Justice Howell said: " There is in the Record an ordi-
" nance of the Police Jury, purporting to have been adopted
" after the institution of this suit, and after the defense
" was set up, and confessing judgment in this suit for the
" amount claimed.

" If the Police Jury were without authority to issue the
" warrant sued on, they were without authority to bind the
" parish by confessing judgment for their amount. Such
" action would be taking advantage of illegal or usurped

" authority, which courts of justice can not sanction. The " lower Court seems not to have regarded the alleged " confession. The motion is denied."

In *Marchand vs. Noyes et al., 33 An. 884*, where the plaintiff having recovered a final judgment against the Mississippi and Mexican Gulf Ship Canal Company, issued a *fi. fa.* and served garnishment process with interrogatories upon the City of New Orleans, and the interrogatories were taken for confessed, and it was shown that through some accident or inadvertence the matter had escaped the attention of the Mayor, the Supreme Court ruled, that it was clearly within the power of the Court below, in the exercise of a sound discretion, to set aside judgment before signature, and grant a new trial. Justice Fenner said:

" We think, in the present case, its discretion was " soundly exercised for the reason assigned by the judge, " that a municipal corporation should not be made to " suffer for the unintentional neglect of an officer, like " the Mayor, overwhelmed with a multiplicity of public " duties."

In the learned work of Bigelow on Estoppel, Fourth Edition, p. 530, where that writer discusses the right of a corporation to deny the acts which it has assumed to do, he goes on to say:

" The more important question is, when, if at all, may a " corporation repudiate its undertaking by alleging that the " undertaking was without its powers? Great confusion " among the earlier authorities will be found in the answer " given to this question, nor are the recent cases in perfect " harmony. It appears, however, to be agreed by the " better authorities of the present time, that if the act " undertaken was in or of itself *ultra vires* of the cor- " poration, no act of the body will have the effect to estop " it, to allege its wants of power to do what was undertaken. " The powers of the ordinary corporation being dependent

"upon the statute which created the body, those powers "can not, of course, be enlarged by the body itself; and "the act in question being in itself *ultra vires*, the cor- "poration can not make it otherwise whether directly or "indirectly."

See also the opinion of the Supreme Court of the United States, as given by Mr. Justice Bradley in *Town of South Ottawa vs. Perkins*, *94 U. S., p. 260*. The opinion of the court, as given by Mr. Chief Justice Waite, in the case of *Anthony vs. County of Jasper*, *101 U. S., p. 693*, and the opinion of the court in *Northern Bank of Toledo vs. Porter Township Trustees*, by Mr. Justice Harlan, *110 U. S., p. 608*.

# Supreme Court of the United States

JAMES WALLACE PEAKE

*vs.*

THE CITY OF NEW ORLEANS.

No. 780.

JAMES WALLACE PEAKE

*vs.*

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No. 1234.

*Statutes and parts of Statutes of the State of Louisiana cited and relied upon by Plaintiffs in error and Appellants in their brief in the above entitled and numbered cases.*

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No. 165.] AN ACT

To provide for leveeing, draining, and reclaiming swamp lands in certain portions of the parishes of Orleans and Jefferson.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana, in General Assembly convened*, That for the purposes of this act, all that portion of the parish of Orleans, lying and being within the following limits, viz: beginning at the Mississippi River at Julia street, following said street to the canal of the New Orleans Canal and Banking Company, following said canal as far as Lake Pontchartrain, along said lake to the Bayou Saint John, following said bayou to the Canal Carondelet, along said Canal to St. Peter street, along St. Peter street to the river, following the banks of the river to the starting point, shall constitute the *First Draining District* That the following portions of the parishes of Orleans and Jefferson, viz: beginning at the Mississippi River, at the upper side of Julia street, along Julia street to Mobile Landing, along said landing to Delord street, along Delord street and the upper side of the canal of the New Orleans Canal and Banking Company, following said canal to Lake Pontchartrain, along the shores of said lake to the Jefferson and Ponchartrain Railroad, following said road to the river Mississippi, and following the banks of said river to the starting point, shall constitute the *Second Leveeing and Draining District.* And all that portion of the parish of Orleans lying and being within the following limits, viz: from the river Mississippi at St. Peter street, along the lower side of said street to Canal Carondelet, following said canal to Bayou St. John, along said bayou to Lake Ponchartrain, along the shores of said lake to Lafayette Avenue, following said avenue to the river Mississippi, along the banks of said river to the starting point, shall constitute the Third Leveeing and Draining District.

SEC 2. *Be it further enacted, &c.*, That for the purpose of carrying into effect the provisions of this act, there shall be three Boards of Commissioners, to be appointed and organized as follows: one to be designated and known as the Board of Commissioners of the First Draining District; one as the Board of Commissioners of the Second Draining District; and one as the Board of Commissioners of the Third Draining District. Each Board of Commissioners shall be composed of five persons, residents of the district for which they are appointed. The Board of Commissioners of the First and Third Draining Districts shall be appointed by the Mayor of the city of New Orleans, by and with the advice and consent of the Board of Aldermen of said city; and the Board of Commissioners of the Second Draining District shall be composed of five persons, residents of the said district, to be appointed as follows, viz: two by the Mayor of the city of New Orleans, by and with the advice and consent of the Board of Aldermen of the city, one by the council of the city of Jefferson, one by the Police Jury of the parish of

Jefferson, and one by the council of the town of Carrollton. Said Commissioners shall serve for the term of four years; and no member of the Common Council of the city of New Orleans, of the Police Jury of the parish of Jefferson, or of the councils of the city of Jefferson and town of Carrollton, shall, during the term for which they shall have been elected, be eligible as Commissioners in either of the Districts aforesaid.

SEC. 3. *Be it further enacted, &c.*, That at the first meeting of the Boards of Commissioners of the First and Third Draining Districts, the said Boards shall be divided by lot into two classes. The seats of the first class shall be vacated at the end of two years, and the seats of the second class shall be vacated at the end of four years; *Provided*, That three members shall constitute the first class, and two members shall constitute the second class, and that every two years thereafter the Mayor, as aforesaid, shall appoint, as hereinafter provided, Commissioners to fill the vacancies in each Board whose terms may have expired; and in case of vacancy by death, resignation, or otherwise, the Mayor shall appoint, in the same manner as hereinafter provided, Commissioners to fill the vacancies of the unexpired term; it being understood that the Board of Commissioners for the Second Draining District shall serve for the full term of four years, and in case of vacancy by death, resignation, or otherwise, in said Board, such vacancy shall be filled by the authority making the original appointment.

SEC. 4. *Be it further enacted, &c.*, That the said Boards of Commissioners are hereby invested with all the rights and powers necessary to thoroughly drain the several Draining Districts, as expressed in the first section of this act, and to that end shall have the right, at all times, of entering on the lands within the limits of the districts aforesaid, and of placing thereon their engines and machinery, and of freely passing over and using the same, and of digging all necessary canals and drains, making all necessary embankments and levees, and of doing all things lawful to be done, which may be useful or necessary in draining, cleaning and reclaiming the land within said districts. Said Boards of Commissioners are authorized to cut their canals and drains through the streets and squares, and in the event of any street selected for the location of a canal being too narrow for a draining canal and a public highway, the said Board of Commissioners may cause such streets to be widened; *Provided, however*, That any person or corporation shall have the right, by petition addressed to any court of competent jurisdiction, to oppose any acts of the Boards, in the exercise of the powers conferred by this section on said Boards, and it shall be the duty of such court summarily to hear and determine the same, after a full hearing of both parties; and such court shall limit the action of the Boards to the exercise of the powers herein conferred, in carrying into effect the provisions of this act, according to its true intent and meaning, and where the same cannot be done without injury or loss to the complainant, said court shall award

adequate compensation; *And provided also*, That on appeal to the Supreme Court, the trial of the same shall have priority and preference over all other cases therein, and on such appeals the said Boards shall only be required to give security for costs of appeal; *And provided further*, That in any such suit nothing herein contained shall prevent said Boards from recovering judgment against any such complainant or complainants for damages, where it can be shown that such have been incurred, and that such suit or suits were brought on frivolous grounds or from improper motive.

SEC. 5. *Be it further enacted, &c*, That said Boards shall each have the right to sue and be sued, to contract for works necessary to be done, under this act, to have a seal and to alter the same, to accept and receive any gift, legacy, or donation that may be made or left in their favor, and generally to do all that may be convenient or necessary for the performance of the duties which are imposed upon them, or that may be requisite for the welfare or success of the plan of operations which are confined to them by this act, but not beyond the powers herein conferred.

SEC 6. *Be it further enacted, &c.*, That the domicil of the said Boards of Commissioners shall be located in the city of New Orleans; each Board shall organize within fifteen days after their appointment, or as soon thereafter as practicable, and shall appoint one of their number as President, on whom legal service of all process or citation against such Board shall be made. Each Board of Commissioners is hereby empowered and authorized to appoint such officers, and to make such by-laws, rules, and regulations for their own government, as they may see fit, and from time to time to change the same, under such restrictions as they may think proper to impose.

SEC. 7. *Be it further enacted, &c.*, That said Board of Commissioners shall have the right to proceed, and are hereby empowered to levee, drain, and reclaim the lands embraced within their respective draining sections or districts, as established by this act, in the following manner: Whenever either of said boards of commissioners is prepared to drain their respective sections or district, such boards of commissioners shall cause a plan thereof to be made, accurately designating the limits of the section or district, to be drained as far as possible, the subdivision of the property therein contained, *and the names of the proprietors*, as also the dimensions and directions of the canals intended to be dug, and the place where the steam engines will be established. Such plan or plans shall be deposited in the office of the Recorder of Mortgages of the parish in which the section or district to be drained is situate, and notices shall be inserted, in the French and English, in two newspapers published in the said city of New Orleans, at least once a week during four weeks in succession, announcing that such board of commissioners will proceed to drain such section, describing the place where the plan thereof is deposited, accurately defining the limits thereof,

and indicating as nearly as possible, the time within which the draining thereof will be completed, and the probable cost of said works. After such publications, such board of commissioners shall apply, by petition, to one of the district courts in the parish of Orleans for that portion of the section or district lying within the limits of said parish, and to the District Court in the parish of Jefferson for that portion of the section or district lying within said parish; which court or courts, upon due proof being made of the publications of said notices aforesaid, *shall decree that each portion of the property situated within the said limits is subject to a first mortgage, lien, and privilege in favor of such board of commissioners for such amount as may be assessed upon such property for its proportion* of the costs of draining such section or district, and interest thereon at six per centum per annum from demand thereof. The decree of the District Court in the parish of Orleans shall be recorded in the office of the Recorder of Mortgages in and for said parish, and the decree of the District Court of the parish of Jefferson, shall be recorded in the office of the Parish Recorder of said parish, and a certified copy of the aforesaid plan or plans shall also be deposited in each of said offices for the information of said recorders. Said recorders shall be entitled to twenty dollars each for the recording of the said decree and the deposit of said plan or plans; and, in case they be required by said board of commissioners to record the said decree in the name of any or all of the proprietors of real property within said section or district, they shall be entitled to receive fifty cents for such special recording; and whenever the said recorders, or either of them, may be required to deliver a certificate of mortgages on any real property embraced within said draining section or district, such recorder shall mention therein that such property is subject to a lien, privilege, and first mortgage in favor of the board of commissioners of the section or district in which such property is situate, for such sum of money as may be assessed on such property for the draining thereof; said lien, privilege, and first mortgage shall take precedence over all mortgages, liens, and privileges whatsoever, whether tacit, conventional, legal or judicial, and shall attach to said property until the amount assessed and the interest thereon shall have been paid in full.

SEC. 8. *Be it further enacted*, &c., That said boards of commissioners, each within its own section or district, shall have the right and are hereby authorized and empowered to levy such uniform assessment or assessments upon the superficial or square foot of lands situate within the draining section or district of such board, to defray the construction of the levees, machinery, canals, and other works necessary for the purpose of carrying out the provisions of this act as applicable to its particular district, which shall be collected, from time to time, as the wants of such board or boards of commissioners may require; *Provided, however*, That the same shall not, in the aggregate, for any one district, exceed the sum of three hundred and fifty thou-

sand dollars; *And provided further*, That not more than one-half of said amount shall be demandable within two years after the passage of this act.

SEC. 9. *Be it further enacted, etc.*, That on non-payment of the amount of the assessment, judgment therefor shall be recoverable before any court of competent jurisdiction, and the land so assessed shall be sold according to law, and each board are hereby authorized to purchase the same, and shall hold or dispose of the same for the benefit of such drainage district; *Provided*, That the sale thereof shall be made at public auction after thirty days' notice by three advertisements in some newspaper published in such district; *And provided further*, That the price of such sale shall fully cover the amount of the judgment with all costs and interests up to the time of purchase by such draining board with six per cent. per annum interest upon the aggregate so formed from that time until its alienation by the board, and if, while the property of the draining district, such property would have become liable for any further assessment, the sale shall also cover the amount thereof.

SEC. 10. *Be it further enacted, etc.*, That no compensation shall be allowed to said commissioners for their services, but they shall have the right to appoint and employ such officers and employes as they may deem proper, and fix their salaries or compensations; and said commissioners shall make annual reports of all their operations under this act to the Common Council of the city of New Orleans, and as often as required so to do by said Council.

SEC. 11. *Be it further enacted, etc.*, That the sum of eighty-one thousand dollars be and the same is hereby appropriated out of the Swamp Land Fund of the First Swamp Land District of this State, to aid in carrying out the object of this act. The sum so appropriated shall be equally divided among the said draining sections or districts, as fixed by this act, and in proportion to the area of each district to be drained.

SEC. 12. *Be it further enacted, etc.*, That the Legislature reserve the right of repealing, altering, changing, or modifying this act.

SEC. 13. *Be it further enacted, etc.*, That this act shall take effect and be in full force from and after its passage, and that all laws or parts of laws contrary to, or in any wise conflicting with the provisions of this act, be and the same are hereby repealed.

WM. W. PUGH,
Speaker of the House of Representatives.
C. H. MOUTON,
Lieutenant-Governor and President of the Senate.

Approved March 18th, 1858.

ROBERT C. WICKLIFFE,
Governor of the State of Louisiana.

A true copy.
ANDREW S. HERRON,
Secretary of State.

No. 191.] AN ACT

Supplementary to an act entitled "An Act to provide for leveeing, draining and reclaiming swamp lands in certain portions of the parishes of Orleans and Jefferson," approved March the eighteenth, eighteen hundred and fifty-eight.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana, in General Assembly convened*, That in order to enable the several Boards of Commissioners created under and by virtue of the act entitled "An Act to provide for leveeing, draining and reclaiming swamp lands in certain portions of the parishes of Orleans and Jefferson," approved March the eighteenth, eighteen hundred and fifty-eight, to carry into effect and to commence immediately the works therein contemplated, each of said Boards of Commissioners be, and are hereby authorized and empowered to issue bonds of the sum of five hundred dollars each, having not more than thirty years to run, and bearing interest not exceeding eight per cent per annum; the said bonds shall be designated as "Draining Bonds" and shall be signed by the President and countersigned by the Secretary of the Board of Commissioners issuing them; *Provided*, That the total amount of bonds so issued shall not, for any one draining section or district, exceed the sum of three hundred and fifty thousand dollars.

SEC. 2. *Be it further enacted, &c.*, That it shall be the duty of the Boards of Commissioners aforesaid, upon issuing draining bonds as authorized by the first section of this act, to fix and determine the amount of assessment to be levied upon the superficial or square foot of land situate within the draining district or section of such Board or Boards, in conformity with the provisions of the afore recited act, entitled "An Act to provide for leveeing, draining and reclaiming swamp lands in certain portions of the parishes of Orleans and Jefferson," approved March eighteenth, eighteen hundred and fifty-eight, and fix and apportion the amount to be paid yearly, by the owner or owners of said lands, in order to pay the annual interest on said bonds, and such bonds as may mature: *Provided*, That the amount of assessment demandable and collectable yearly, shall not exceed in the aggregate more than one-tenth of such assessment.

SEC. 3. *Be it further enacted, &c*, That it shall be the duty of each of said Boards of Commissioners daily, upon the receipt of any sum or sums of money, in payment of any assessment levied as aforesaid, to deposit the same with the "fiscal agent of the city of New Orleans," to the credit of the draining fund of its section or district; and the amount or amounts so deposited with said fiscal agent, as a special fund for the payment of the annual interest on said draining bonds, and the redemption of said bonds at maturity, and shall only be drawn therefrom to pay said annual interest or redeem said bonds, or for the purpose of purchasing bonds as hereinafter provided: *Provided*, That no portion of said fund shall be drawn, except by virtue of

a resolution of the Board of Commissioners depositing the same and for the purpose aforesaid.

SEC. 4. *Be it further enacted, &c.*, That whenever, after the payment of the annual interest on said bonds, and of such bonds as have matured, the amount remaining with said fiscal agent, to the credit of the Draining Fund aforesaid, of either of said draining sections or districts, shall exceed the sum of ten thousand dollars, it shall be the duty of the Board of Commissioners, of such section or district, to advertise during thirty days in the official journal of the city of New Orleans, for sealed proposals for the sale to said Board of such of the draining bonds thereof, having the shortest period to run, and amounting to the sum so remaining on deposit as aforesaid; and at the expiration of said publication, said Board of Commissioners shall open said sealed proposals and accept the lowest bid or bids: *Provided*, That no bid shall be accepted, which demands more than the face of the bond.

SEC. 5. *Be it further enacted, &c.*, That after the completion of the works for the leveeing, draining and reclaiming of either of the draining sections or districts aforesaid, the Boards of Commissioners thereof shall annually make an estimate of the amount required to keep up and maintain the said works and continue the draining thereof, and shall furnish the said estimate to the Common Council of the city of New Orleans for that portion lying within the limits of said city, and to the Police Jury of the Parish of Jefferson, for that portion lying within the limits of the parish of Jefferson; and it shall be the duty of the said Common Council and the said Policy Jury respectively, to levy a uniform tax or assessment upon the superficial or square foot of the lands situate within said draining sections or districts respectively, sufficient to meet the amounts respectively required, and the tax or assessment so levied, shall be collected in the same manner as the city and parish taxes, and paid unto the respective Boards of Commissioners, who shall disburse and account for the same.

SEC. 6. *Be it further enacted, &c.*, That it shall be the duty of each of said Boards of Commissioners, in the month of January of each year, to make a full and complete report to the Common Council of the city of New Orleans and the Police Jury of the parish of Jefferson respectively, showing what works have been made, or may be in progress, the condition and costs thereof; what bonds have been issued and the amounts derived therefrom, the disposition thereof, what amounts from assessments have been paid, the condition of the Trust Fund, and generally all such other information as may be required or be of interest.

SEC. 7. *Be it further enacted, &c.*, That the bonds which may be issued by either of the Boards of Commissioners by virtue of this act, shall be exempt from any and all taxation in whose hands the same may be found.

SEC. 8. *Be it further enacted, &c.*, That the said Boards of

Commissioners shall have at all times access to, and the right of copying, or causing to be copied, any plans or parts of plans, of the city of New Orleans and the parish of Jefferson, in the possession or keeping of the Common Council of said city of New Orleans or of the parochial authorities, or of any surveyor or any other officer thereof, to be certified by such custodian to be a correct copy or copies thereof, and the same to include the street or streets, roads or highways of any portion or section thereof, to be drained accoding to the provisions of this act, and of the act to which this act is supplementary.

SEC. 9. *Be it further enacted, &c.* That this act shall take effect and be in full force from and after its passage.

WM. W. PUGH,
Speaker of the House of Representatives.
WM. F. GRIFFIN.
President of the Senate.

Approved March 17th, 1859.

ROBERT C. WICKLIFFE,
Governor of the State of Louisiana.

A true copy.
ANDREW S. HERRON,
Secretary of State.

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No. 57 ] AN ACT

To provide for the Collection of the Assessment for Draining, under the acts of March eighteenth, eighteen hundred and fifty-eight, and the act supplementary thereto of March seventeenth, eighteen hundred and fifty-nine.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana, in General Assembly convened,* That the amount of assessment which the Board of Commissioners of the several Draining Districts are authorized to fix and apportion, to be paid yearly by the owner or owners of the lands within said Districts, in order to pay the annual interest on the Bonds issued or to be issued by said Boards of Commissioners, and such bonds as may mature by virtue of the second section of an act supplementary to an act to provide for leveeing, draining and reclaiming Swamp Lands in certain portions of the parishes of Orleans and Jefferson, approved March eighteenth, eighteen hundred fifty-eight, shall be collected and sued for, the following mode of proceedings, to wit: As soon as any assessment has been made, and notice thereof shall have been given, a copy thereof shall be filed in the Third District Court of New Orleans, for the assessment made on property within the limits of the parish of Orleans, and in the Third Judicial District Court sitting at Carrollton for assessments made on property within the limits of the parish of Jefferson, on which tableau of assessment thus to be filed the property assessed shall be set forth, together with the amounts assessed, *and*

*the names of the owners thereof*, if known, and if the owners' names are not known, then it shall be *stated in said assessment roll that the property assessed belongs to owners unknown;* that a petition shall be filed with said assessment roll praying for an order that *all persons whom it may concern*, do show cause within thirty days from the first publication of said order, if any they have, why said assessment roll should not be approved and homologated; that said order thus rendered shall be published in the English and French languages, at least twice each week for thirty days in one newspaper published in the city of New Orleans, as to the order of the Third District Court of New Orleans, and in one newspaper published in the parish of Jefferson, as to the order of the Third Judicial District Court sitting at Carrollton; and after said publications the said Courts shall, on motion of the Counsel of said Board of Commissioners, *approve and homologate said assessment rolls, which shall be a judgment against the property assessed and the owners thereof, on which execution may issue as on judgments rendered in the ordinary mode of proceedings*, and the Court shall at the same time and in the same judgment, order the delinquent parties to pay ten per cent in addition to the amount assessed, to pay costs and counsel fees.

SEC. 2. *Be it further enacted, &c*, That this act shall take effect from and after its passage.

C. H. MORRISON,
Speaker of the House of Representatives.
HENRY M. HYAMS,
Lieutenant Governor and President of the Senate.

Approved March 1st, 1861.

THOS. O. MOORE,
Governor of the State of Louisiana.

A true copy.
PLINY D. HARDY,
Secretary of State.

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No. 30.] AN ACT

To provide for the drainage of New Orleans.

WHEREAS, The proper and efficient drainage of the city of New Orleans is of paramount importance to the sanitary and commercial interests of the city, as also of the State of Louisiana; and whereas, the Mississippi and Mexican Gulf Ship Canal Company are prepared to immediately undertake the work with the only kind of machinery adapted thereto and now ready for use, and to prosecute the same with energy and economy to completion, therefore —

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana, in General Assembly convened*, That the Mississippi and Mexican Gulf Ship Canal Company, a

corporation now existing and domiciled in the city of New Orleans, be and is hereby authorized and empowered to excavate drainage canals and build protection levees within the present corporate limits of New Orleans and Carrollton, under the conditions and with the stipulations hereinafter expressed.

SEC. 2. *Be it further enacted, etc.*, That the said Mississippi and Mexican Gulf Ship Canal Company shall be authorized and empowered to dig a canal, and with the earth removed from the same to build outside of said canal a protection levee, in the rear of the city of New Orleans, and near the shore of Lake Pontchartrain; the exact location of the said canal and levee, and of all canals dug and levees built by the said company, to be designated and fixed by the Board of City Administrators, and the title to the lands necessary for said works to be procured and held, for the benefit of the city of New Orleans, by the Board of Administrators of the city of New Orleans; the said lake shore canal to be not less than sixty-five feet wide on the surface, and fifteen feet deep in the middle, with proper slope of the sides, the said canal or canals along the lake shore to serve as a reservoir for draining the city of New Orleans and the lands in the rear of the city, the drainage to be pumped from the canal over into the lake, and the said protection levee to be not less than one hundred feet wide, and of sufficient height to completely protect the city from overflow from Lake Pontchartrain.

SEC. 3. *Be it further enacted, etc*, That said company shall also be authorized and empowered to excavate canals of the dimensions, and at such localities as may be fixed by the Board of Administrators of the city of New Orleans, which shall fully drain the area bounded by the protection levees herein contemplated and the Mississippi river, and connect with the drainage canals now located in the said area.

SEC. 4. *Be it further enacted, etc.*, That the said company shall also be empowered and authorized to build a canal and protection levee below the city of New Orleans to connect the lower end of the protection levee, along the lake, with the Mississippi, of a sufficient size to fully protet the city from overflow, and on a line to be designated by the Board of Administrators; and to construct a like canal and protection levee above the city, the dimensions and locality in like manner to be designated by the said Board of Administrators; the object of these two canals and protection levees to be the protection from overflow of the areas between the Mississippi river and Lake Pontchartrain, above the New or company canal, and below the Carondelet canal.

SEC. 5. *Be it further enacted, etc*, That the said Mississippi and Mexican Gulf Ship Canal Company shall be authorized and empowered to dig all the smaller canals, required for the drainage of New Orleans and the lands in the rear of the said city, of the dimensions of ten feet or more than ten feet in width.

SEC. 6. *Be it further enacted, etc.*, That the Board of Administrators shall be required, and it is hereby made their duty, im-

mediately after the passage of this act, to locate the lines of the canals and protection levees, specified in the various sections of this act, in time to prevent delay in the prosecution of the work on the part of the said company. The Board of Administrators are also required to build and run all the pumps and drainage machines necessary to lift the drainage water from the said canal or canals over into Lake Pontchartrain, and moreover to keep the water in the canals in process of excavation, so far as practicable, at the proper level for the work of excaxation, and at the same time assist the drainage of the adjacent lands; and should the City Council fail to locate the lines of said canals and protection levees above specified, the city of New Orleans is hereby made liable to the said company for the damages resulting from such delay.

SEC. 7. *Be it further enacted, etc.*, That said Mississippi and Mexican Gulf Ship Canal Company shall be required to have ready for work, within fifteen days after the passage of this act, machinery of sufficient power to excavate at least twenty-five thousand (25,000) cubic yards per month, and to move the same the distance required to build the protection levee, and to increase as soon as practicable their machinery to the capacity of at least fifty thousand cubic yards per month.

SEC. 8. *Be it further enacted, etc.*, That at the end of every month it shall be the duty of the City Surveyor of New Orleans, or an engineer appointed, by the Board of Administrators for that purpose, to examine the work done by the said Mississippi and Mexican Gulf Ship Canal Company, during said month, and upon the measurement of the width and depth of the canal, canals or parts of canals dug, and protection levees built, certify as to the number of cubic yards excavated and the number of cubic yards of protection levees built during the said month. It shall be the duty of the Administrator of Accounts, on the presentation to him of the said certificate of the City Surveyor or engineer appointed by the Board of Administrators, by the President of the said Mississippi and Mexican Gulf Ship Canal Company, to draw a warrant or warrants on the Administrator of Finance, in payment of the work so done, at the rate of fifty (50) cents per cubic yard of excavation, and fifty (50) cents per cubic yard for the protection levee, the said warrants to be of such denomination as may be required by the President of the said company. These warrants it shall be the duty of the Administrator of Finance to pay on presentation to him, in case there be any funds in the city treasury to the credit of the said Mississippi and Mexican Gulf Ship Canal Company; but should there not be sufficient funds to cash the said warrant or warrants, then the Administrator of Finance is hereby required to indorse upon the same the date of presentation, after which date the said warrant or warrants shall bear interest at the rate of eight per cent. per annum until paid, which condition shall be set forth in the form of the said warrant or warrants.

SEC. 9. *Be it further enacted, etc.*, That in order to provide

funds for the payment of the work to be done by the said company, the three boards of draining commissioners for the draining districts of Orleans and Jefferson, established under the acts of March 18, 1858, of March 17, 1859, and the several amendments thereto, and any and all other person, persons, or corporations, who may have them in possession, shall transfer to the Board of Administrators of New Orleans *all moneys, assessments and claims of drainage in their hands or under their control, all titles to real estate, all books, plans, tableaus, judgments in favor of commissioners, the office furniture of said drainage commissioners,* a true statement of the claims of said drainage commissioners against the city, to be adjudicated and settled out of the money collected by the city, and everything pertaining to said draining districts; that the Board of Administrators of New Orleans, be and are hereby subrogated to all the rights, powers and facilities possessed and enjoyed by the commissioners of the several draining districts, or of any other corporation charged with the duty of drainage and leveeing within the limits of the city of New Orleans and Carrollton; that the Board of Administrators be and are hereby authorized and directed to collect from the holders of property within the said districts the balance due on the assessments, as shown by the books of the first, second and third drainage districts, under the acts of March 18, 1858, that of March 17, 1859, and the several supplementary and amendatory acts thereto, *which said assessments are hereby confirmed and made exigible, at such time and in such manner as the Board of Administrators may designate; provided, that the said board shall collect the assessments herein authorized in time to provide for the payment of the warrants to be issued to the said company at the date of their issue; also, to make assessments of two mills per superficial foot in those parts of the three draining districts, as existing under, and created by, the acts of March* 18, 1858, *and of March* 17, 1859, *and amendments thereto, and on such other lands as are brought within the protection levees contemplated by this act, where no assessments have been made; and to execute and enforce the same as provided for by the several acts of the Legislature, creating and regulating said boards of draining commissioners; provided,* that all money or moneys received by the said Board of Administrators from the said commissioners of the drainage districts, either from the sale of property received from the said commissioners, from the collection of claims for drainage now due, from the collection of drainage assessments, and from any of the sources of revenue contemplated by the provisions of this section of this act, *be placed to the credit of the Mississippi and Mexican Gulf Ship Canal Company, and held as a fund to be applied only to the drainage of New Orleans and Carrollton, in accordance with the provisions of this act; and that all property, not money, so received, shall be held in trust for the payment of said Mississippi and Mexican Gulf Ship Canal Company, and ultimately for the benefit of New Orleans, should the same not be required for the work of drainage; and provided further,* that the rights, powers and faculties possessed

and enjoyed by said Board of Administrators of New Orleans, relative to drainage, shall be so construed as not to conflict with the rights powers and faculties acquired by the said company, in excavating canals and building levees, as stipulated in the various sections of this act.

SEC. 10. *Be it further enacted, etc.*, That all acts and parts of acts in conflict with, or inconsistent with the various provisions of this act, are hereby repealed, and especially the act entitled "An act to repeal all laws and parts of laws creating drainage districts in certain portions of the parishes of Orleans, Jefferson," etc., passed *March* 2. 1869, generally known as the Ship Island canal bill; also, an act amendatory thereto, approved *March* 16, 1870.

SEC. 11. *Be it further enacted, etc.*, That it is hereby made the duty of the Board of Administrators to see that the parties whose duty it is to do the same, shall, immediately after the passage of this act, build such levees on both sides of the Carondelet canal, and the New, or Canal and Banking Company's canal, extending to Lake Pontchartrain and around their basins, as to effectually prevent the overflow of water from the said canals during storm, tides or high water in Lake Pontchartrain, the dimensions of said levees to be determined by the Board of Administrators.

SEC. 12. *Be it further enacted, etc.*, That this act shall be favorably construed, so as to favor all the purposes and objects of the same, and the operations of the provisions thereof, and shall take effect from and after its passage

(Signed) GEO W. CARTER,
Speaker of the House of Representatives.

(Signed) OSCAR J. DUNN,
Lieutenant Governor and President of the Senate.

A true copy:
GEO E BOVEE,
Secretary of State.

The foregoing act, received in my office, February 24, 1871. having been presented to the Governor of the State of Louisiana for his approval, and not having been returned by him to the House of the General Assembly in which it originated, within the time prescribed by the Constitution of the State of Louisiana, has become a law without his approval.

GEO. E. BOVEE,
Secretary of State.

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No. 73.] AN ACT

To authorize the Council of the city of New Orleans to levy a police tax; to regulate levies of taxes, the proceedings of tax suits, and the jurisdiction of the district courts for the parish of Orleans in reference thereto; to define and punish forgery in certain cases; to authorize the funding of the floating debt; to consolidate, limit and provide for the debt of the city of New Orleans, principal and interest; to authorize a tax for the support of the city government, and to establish a fiscal agency, defining its duties, and for the better enforcement of the collection of all taxes.

SEC. 13. *Be it further enacted, etc.*, That for unbonded *debts* existing December 31, 1871, and unpaid at the time of the passage of this act, or *caused* by receipts of certificates of 1871, for revenues proper of 1872, and for excavations and levees, drainage machinery and revetments authorized by law or required for the protection of the city from overflow or inundation, the city may issue from time to time, as they may be required, bonds of the denominations of five hundred and one thousand dollars, having fifty years to run, and bearing seven per cent. interest, principal and interest payable in gold in New York or New Orleans, and at any other points that the Council may designate, with quarterly coupons, and that the bonds thus issued shall be called the new consolidated debt of New Orleans. No bonds shall be issued but by authority of the Council, nor for a lower rate than ninety cents on the dollar; all issued for the excavations and levees, authorized by Act No. 30 of 1871, or by drainage laws previously enacted, shall be marked "Drainage Series," and all taxes collected for drainage, and not required for the payment of drainage warrants, shall be devoted to the purchase from the lowest bidder of bonds issued for drainage; no bid to be accepted above par, and the right reserved to the Council to reject all unsatisfactory bids.

And for other bonds of the city not matured, bearing interest at not less than seven per cent, the city may exchange bonds of the new consolidated debt, at such prices, not less than par, for the new consolidated debt bonds as may be found to the advantage of the city; but no exchange shall be effected except by consent and order of the Council, publicly given, or ordinance fully authorizing the same.

For all bonds fully matured and payable so soon as the term they were issued for shall have expired, and which the city shall not have the available funds to pay in cash, the city may exchange new consolidated bonds, at the rate of not less than ninety cents on the dollar on demand of the holders of the bonds so matured.

And it is furthermore enacted that at no time shall the face of the bonded debt outstanding and unredeemed added to the certified debt of every form exceed twenty-three millions of dollars, and all issue of bonds or evidence of indebtedness whatever in excess of said amount shall be unlawful, and shall not import or convey any obligation. And if any person under color of office, or otherwise, shall issue any bond or warrant in violation of this section, he shall be prosecuted crimally by indictment or information, and upon conviction, shall be condemned to imprisonment for two years; and any person negotiating or attempting to negotiate such bond or warrant shall be considered an accessory to the fact, and subject to the same punishment as the said offender.

SEC. 14. *Be it further enacted, etc.*, That within the months of November and December, 1872, and annually thereafter, the Council shall adopt estimates of receipts and expenditures (the latter including police and excluding schools) for the ensuing

year. The estimate of expenditures shall not be finally adopted until one week shall have elapsed after final adoption of the estimate of revenues, and it shall not exceed the same.

SEC. 15. *Be it further enacted, etc.*, That the Council, after the adoption of the estimate, shall proceed to levy the annual taxes required, to wit:

*First*—The city debt tax, which shall be based upon the detailed estimate of the sinking funds and interest falling due. For all bonds for which no other retiring provision exists by law, an estimate shall be included of not less than two nor more than ten per cent. of the face of the bonds outstanding of any of the several issues, which shall be applied to the retiring of bonds offered at the most advantageous rates, no bid to be accepted higher than par, and the right reserved to reject all bids. No limit other than herein laid down shall apply to this tax, which is hereby declared a vested right of the bondholders interested.

*Second*—A tax for current city expenses, including police and exclusive of interest and schools. This tax shall in no year exceed one and a quarter per cent. upon the assessed value of real, personal and mixed property.

These taxes shall bear the name of the year in which they shall be collectable, and the assessment upon which they shall be made shall be termed the assessments for the said year.

SEC. 16. *Be it further enacted, etc*, That no provision in any general law of the State limiting the power of taxation by the several cities, towns, parishes and other corporations, shall be held to apply to any of the taxes of the city of New Orleans, herein or otherwise specially authorized to be levied.

(Signed) O. H. BREWSTER,
Speaker of the House of Representatives.

(Signed) P. B. S. PINCHBACK,
Lieutenant-Governor and President of the Senate.

Approved April 26, 1872.

(Signed) H. C. WARMOTH,
Governor of the State of Louisiana.

A true copy:
F. J. HERRON,
Secretary of State.

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No. 16.] AN ACT

To authorize the city of New Orleans to assume exclusive control of all drainage works in the drainage districts; to authorize the purchase of certain rights and property of the Mississippi and Mexican Gulf Ship Canal Company, and its transferee; and to provide for the manner of making said purchase and for paying therefor in drainage warrants.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana in General Assembly convened*, That the Common Council of the city of New Orleans is hereby authorized and empowered to transact and contract with the Mississippi and Mexican Gulf Ship Canal Company, and the transferee thereof, for the purchase and settlement of all or any

rights, franchises, and privileges created, authorized, or arising in favor of said company or said transferee under and by virtue of act No. 30 of acts of 1871; also for the purchase and transfer to the city of New Orleans of all tools, implements, machines, boats and apparatus belonging to said company or its transferee, and by it or him used for or pertaining to drainage work authorized to be done by said Act No. 30.

SEC. 2. *Be it further enacted, etc.*, That should it be deemed advisable by said Council to make said purchase and settlement, it shall be the duty of said Council of the city of New Orleans to provide by ordinance for the appointment of appraisers to estimate the value of the rights and things to be purchased or settled for, and the duties and powers of said appraisers shall be specifically assigned in said ordinance.

SEC. 3. *Be it further enacted, etc.*, That all amounts to be paid, when agreed upon, shall be paid in drainage warrants by the city of New Orleans, which said warrants shall be issued in the same form and manner as those heretofore issued to the transferee of the said company under act No. 30 of acts of 1871 for work done. They shall be made payable out of the drainage assessments, and shall be issued as soon as any agreement shall have been completed.

SEC. 4. *Be it further enacted, etc.*, That whenever the sale and purchase contemplated by this act shall be completed and the drainage warrants issued in payment of the price agreed on and fixed, the city of New Orleans, through its officers, shall have exclusive control of all the rights, powers and franchises granted by act No. 30 of acts of 1871 relative to drainage or other public works to the Mississippi and Mexican Gulf Ship Canal Company or its transferree; the city of New Orleans shall alone have the power, either through its own officers and employees or by contract to the lowest bidder, to do all canalling, dredging, ditching, or drainage work required to be paid for by assessment upon property or from the city treasury.

SEC. 5. *Be it further enacted, etc.*, That hereafter the City Council shall fix the dimensions of all canal excavations and protection levees required for the city of New Orleans.

SEC. 6. *Be it further enacted, etc.*, That all laws and parts of laws in conflict with the provisions of this act or inconsistent therewith be and are hereby repealed, and that this act take effect from and after its passage.

(Signed) E. D. ESTILETTE,
Speaker of the House of Representatives.

(Signed) C. C. ANTOINE,
Lieutenant Governor and President of the Senate.

Approved February 24, 1876.

(Signed) WILLIAM P. KELLOGG,
Governor of the State of Louisiana.

A true copy:

P. G. DESLONDE,
Secretary of State.

No. 48.] AN ACT.

To exclude certain lands from the drainage limits as heretofore established; to cancel liens and judgments for drainage of said lands, and to repeal certain laws relative to drainage of the parishes of Orleans and Jefferson.

WHEREAS, The several laws, heretofore enacted for the drainage of certain portions of the parishes of Orleans and Jefferson, have failed in their purposes and a certain portion of the lands therein situated have not and will not be drained; therefore

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana in General Assembly convened*, That all laws or parts of laws providing for the drainage of lands in the parishes of Orleans and Jefferson, be and they are hereby repealed, so far as they provide for the drainage of lands north of the following line, commencing at the intersection of the Metairie Ridge, with the upper protection levee, along said ridge to the New Orleans Canal, to the Metairie Road, thence along the Metairie Road to Bayou St. John, thence along Bayou St. John to Marigny avenue, thence along Marigny avenue to Bayou Sauvage, thence along Bayou Sauvage to People's avenue, thence along People's avenue to Lafayette avenue, thence along Lafayette avenue to the river Mississippi.

SEC. 2. *Be it further enacted, etc.*, That all judgments for drainage of said lands, judgments creating liens and for assessments for drainage of said lands, and all legal proceedings pending therefor, be and they are hereby cancelled and annulled; *provided*, that the benefits of this act shall not be invoked in favor of any land until the State and city taxes due thereon are paid; *provided, further*, that all lands situated within the above described lines and excluded by this act from the drainage limits established under previous laws, and upon which drainage taxes or assessments have already been paid shall hereafter be exempt from all future drainage assessments.

SEC. 3. *Be it further enacted, etc.*, That all acts or parts of acts in conflict with or inconsistent with the provisions of this act be and the same are hereby repealed.

(Signed) LOUIS BUSH,
Speaker of the House of Representatives.

(Signed) LOUIS A. WILTZ,
Lieutenant Governor and President of the Senate.

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OFFICE OF THE SECRETARY OF STATE,
State of Louisiana.

Received in the office of the Secretary of State, at New Orleans, this twelfth day of March, eighteen hundred and seventy-seven, the foregoing bill, having been presented to his Excellency the Governor of the State for his approval and signature, and not having been returned by him to the House of Representatives, in which body it originated, with his signature or

his objections thereto, within the time prescribed by the Constitution of the State of Louisiana, the same has become a law without his approval or signature.

(Signed) OSCAR ARROYO,
Assistant Secretary of State.

A true copy.
OSCAR ARROYO,
Assistant Secretary of State.

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No. 67.] AN ACT.

To define the object of drainage assessments and to regulate the collection of same, and to prevent judgments for assessments being rendered as personal judgments, and to repeal so much of Act No. 57, approved March 1, 1861, as makes such judgments personal, and to confine the execution under assessment judgments to the property on which the assessment is Levied.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana, in General Assembly convened*, That the true intent and meaning of all drainage laws in this State wherein liens and privileges are recorded against property requiring drainage are that under said liens and privileges no assessments for drainage or judgments for the same shall be collected from the property drained, or its owner or owners, until after there has been conferred upon the property such improvements by canals and adequate machinery as will effect the drainage equal in value to the assessment exacted from said property.

SEC. 2. *Be it further enacted, etc.*, That any assessment or judgment embracing the same shall operate only upon the property upon which such assessment is levied.

SEC. 3. *Be it further enacted, etc.*, That all parts of Act No. 57, session acts of 1861, which make judgments on drainage assessments personal judgments be and the same are hereby repealed.

SEC. 4. *Be it further enacted, etc*, That this Act shall take effect from and after its passage.

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OFFICE OF THE SECRETARY OF STATE, }
State of Louisisna. }

Received in the office of the Secretary of State at New Orleans, this fourteenth day of April, A. D. 1877. The foregoing bill having been submitted to his Excellency, the Governor of this State, for his approval and signature, and not having been returned by him to the Senate of the State of Louisiana, in which body it originated, with his approval and signature, or with his objection thereto, within the time prescribed by the Constitution of the State of Louisiana, the same has become a law by limitation of time.

(Signed) WILL. A. STRONG,
Secretary of State.

A true copy:
WILL. A. STRONG,
Secretary of State.

No. 20.] AN ACT

To incorporate the city of New Orleans, provide for the government and administration of the affairs thereof; and to repeal all acts inconsistent and in conflict with its provisions, due public notice having been given according to requirements of Article 48 of the Constitution,

SEC. 42. All laws providing for the drainage of the City of New Orleans, or portions thereof, and a collection of the drainage tax assessment are hereby repealed.

R. N. OGDEN,
Speaker of the House of Representatives.
GEO. L. WALTON,
President pro tem. of the Senate.

Approved June 23. 1882.

S. D. McENERY,
Governor of the State of Louisiana.

A true copy:
WILL A. STRONG,
Secretary of State.

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No. 7.] AN ACT

To extend the limits of the Parish of Orleans, and to change the boundaries of the Parishes of Orleans and Jefferson, and to consolidate the cities of New Orleans and Jefferson, and to provide for the government of the city of New Orleans and the administration of the affairs thereof, and to repeal an act entitled "An Act to incorporate the city of New Orleans," approved February 23, 1852; and to repeal all acts amendatory thereto, and to repeal an act entitled "An Act to incorporate the City of Jefferson," approved March 9, 1850, and to repeal all acts amendatory thereto, and to provide for the funding of the floatiog indebtedness of the corporations as consolidated by this act.

SEC. 34. *Be it further enacted, etc.*, That all the right, title and interest of the city of New Orleans, as now existing in and to all lands, tenements, hereditaments, bridges, ferries, streets, roads, wharves, markets, stalls, levees and landing places, buildings and other property, of whatsoever description, and wherever situated, and with all goods, chattels, money, effects, debts, dues, demands, bonds, obligations, judgments and judgment liens, actions and rights of action, books, accounts and vouchers, be and they are hereby vested in the city of New Orleans, as incorporated by this act, and that all the right, title and interest of the City of Jefferson as now existing in and to all lands, tenements, hereditaments, bridges, ferries, streets, roads, wharves, markets, stalls, levees and landing places, buildings and other property of whatsoever description and wherever situated, and of and with all goods, chattels, money, effects, debts, dues, demands, bonds, obligations, judgments and judgment liens, actions and rights of action, books, accounts and vouchers, be and they are hereby vested in the city of New Orleans as incoprorated by this act; and that all the right, title and interest of the police

jury of the parish of Orleans, right bank, as now existing in and to all lands, tenements, hereditaments, bridges, ferries, streets, roads, wharves, markets stalls, levees and landing places, buildings and other property of whatsoever description and wherever situated, and of and with all goods, chattels, money, effects, debts, dues, demands, bonds, obligations, judgment and judgment liens, actions and rights of action, books, accounts and vouchers, be and they are hereby vested in the city of New Orleans as incorporated by this act, to take effect on the first organization of the Common Council as herein provided; *Provided*, that all the estates, income, funds or property of any description now held in trust by said city of New Orleans, or which shall have been specially pledged or affected by the payment of any debt, shall be held by the city of New Orleans under this act, upon and for the same uses, trusts, limits, limitations, charities and conditions as the same are now held; and the debt generally known as the consolidated city debt, and the bonds issued in favor of the New Orleans, Opelousas and Great Western Railroad Company, the New Orleans, Jackson and Great Northern Railroad Company, and the Pontchartrain Railroad, and all other indebtedness or liablities of the city of New Orleans, whether in the form of bonds, notes, interest coupons, cash warrants, or any other species of obligation whatever, shall be assumed and paid by the city of New Orleans, as constituted and incorporated by this act, and said city is declared liable therefor; *Provided, further*, That all the estates, income, funds or property of any description now held in trust by said City of Jefferson, or the police jury of the parish of Orleans, right bank, or which shall have been specially pledged or affected by the payment of any debt, shall be held by the city of New Orleans under this act, upon and for the same uses, trusts, limitations, charities and conditions as the same are now held; and the debt and all other indebtedness or liabilities of the City of Jefferson, and the police jury of the parish of Orleans, right bank, whether in the form of bonds, notes, interest coupons, cash warrants, or any other species of obligation whatever, shall be assumed and paid by the city of New Orleans, as constituted and incorporated by this act, and said city is declared liable therefor; and upon the organization of the Council of the city of New Orleans, as provided for in this act, all the powers, rights, privileges and immunities possessed and enjoyed by the Mayor and Common Council of the city of New Orleans, as at present constituted, shall cease and terminate, and be vested in the city of New Orleans, as established by this act; and all the rights, powers, privileges and immunities possessed and enjoyed by the Mayor and Common Council of the City of Jefferson, and the police jury of the parish of Orleans, right bank, as at present constituted, shall cease and terminate, and be vested in the city of New Orleans, as established by this act; *Provided*, That all officers of said city of New Orleans and Jefferson, and the police jury of the parish of Orleans, right bank, as at present constituted, shall continue to

discharge their respective offices until superceded by the action of the council created by this act; and that all the ordinances of the city of New Orleans and Jefferson, and of the police jury of the parish of Orleans, right bank, now in force shall remain in force until modified or repealed by the Council created by this act; *Provided, further*, That the vested rights of individuals or companies of the cities of New Orleans and Jefferson, or the police jury of the right bank, that have been acquired from the said corporation, shall not be interfered with, or impaired by the council of the city of New Orleans, as constituted by this act.

(Signed) MORTIMER CARR,
Speaker of the House of Representatives.

(Signed) OSCAR J. DUNN,
Lieutenant Governor and President of the Senate.

Approved March 16, 1870.

(Signed) H. C. WARMOTH,
Governor of the State of Louisiana.

A true copy:
GEO. E. BOVEE,
Secretary of State.

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No. 71.] AN ACT

To annex the city of Carrollton to the city of New Orleans; to provide for the transfer of certain transcript from the office of the recorder; the transfer of books, papers, documents and property of the city of Carrollton, and also the public schools to the city of New Orleans; to provide for the debt of Carrollton; creating the seventh district of the city of New Orleans, and a municipal court; a sanitary district, and repealing the act incorporating the city of Carrollton.

SEC. 5. *Be it further enacted, etc.*, That all the rights, titles and interest of the city of Carrollton as now existing in and to all lands, tenements, hereditaments, bridges, ferries, streets, roads, wharves, markets, stalls, levees and landing places, buildings and other property of whatsoever description and wherever situated, and of and with all goods, chattels, money, effects, dues, demands, bonds, obligations, judgments and judgment liens, actions and rights of action, books, accounts and vouchers, be and they are hereby vested in the city of New Orleans; *provided*, that all estates, income, funds or property of every description now held in trust by said city of Carrollton, or which shall have been specially pledged or affected by the payment of any debt, shall be held by the city of New Orleans under this act upon and for the same uses, trusts, limits, limitations, charities and conditions as the same are now held; and the debt and all other indebtedness or liabilities of the city of Carrollton, including the funding and improvement bonds and the bonds issued to the Jefferson City Gaslight Company, and known as the gas bonds, and notes, interest coupons, wages, salary due or to become due, warrants or other species of obligations whatso-

ever, shall be assumed and paid by the city of New Orleans, and said city is hereby declared liable therefor; *provided, further*, that all officers of said city of Carrollton shall continue as at present constituted to discharge the duties of their respective offices until this act of incorporation can be completed by putting into possession of the proper officers of the city of New Orleans the books, papers, records, documents and other property now belonging to the city of Carrollton, and no longer; and after which time all the powers, rights, privileges and immunities possessed and enjoyed by the mayor and council of the city of Carrollton shall cease and terminate; *and provided, further*, that the claims or vested rights of any person or persons or company or corporation of said city of Carrollton that have been granted, acquired or received from or against said corporaiion of the city of Carrollton or otherwise, shall not be interfered with, divested or impaired by this act, nor by the city of New Orleans, without adequate compensation.

(Signed) CHARLES W. LOWELL,
Speaker of the House of Representatives.

(Signed) C. C. ANTOINE,
Lieutenant-Governor and President of the Senate.

Approved March 23, 1874.

(Signed) WILLIAM P. KELLOGG,
Governor of the State of Louisiana.

A true copy:
P. G. DESLONDE,
Secretary of State.

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No. 22.] JOINT RESOLUTION

Submitting an amendment to the constitution of the State to limit the debt of the city of New Orleans, and the issue of warrants by the officers; and prescribing certain penalties.

SECTION 1. *Be it resolved by the Senate and House of Representatives of the State of Louisiana, in General Assembly convened*, (two-thirds of the members elected to each House agreeing thereto), That at the general election for members of the General Assembly, which will take place in November, 1874, an amendment to the constitution of the State shall be submitted to the qualified electors of the State for their ratification or rejection in the words following:

Article —. The city of New Orleans shall not hereafter increase her debt, in any manner or form, or under any pretext. After the first day of January, 1875, no evidence of indebtedness or warrant for payment of money shall be issued by any officer of said city, except against cash actually in the treasury; but this shall not be so construed as to prevent a renewal of matured bonds at par, or the issue of new bonds in exchange for other bonds, provided the city debt be not thereby increased,

nor to prevent the issue of drainage warrants to the tranferee of contract, under act No. 30 of 1871, payable only from drainage taxes, and not otherwise; any person violating the prohibitions, [provisions] of this article shall, on conviction be punished by imprisonment for not less than two nor more than ten years, and by fine of not less that three dollars nor more than ten thousand dollars.

SEC. 2. *Be it further resolved, etc.*, That at said next general election, the wishes of the electors, in the premises, shall be expressed by printed or written ballots, as follows:

"For the amendment limiting the debt of New Orleans;" or, "Against the amendment limiting the debt of New Orleans," and said ballots shall be counted and returns made, and the result declared as in the case of election of State officers.

(Signed) CHARLES W. LOWELL,
Speaker of the House of Representatives.

(Signed) C. C. ANTOINE,
Lieutenant-Governor and President of the Senate.

Approved February 24, 1874.

(Signed) WILLIAM P. KELLOGG,
Governor of the State of Louisiana.

A true copy:
P. G. DESLONDE,
Secretary of State.

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No. 5.] AN ACT

To limit and restrict the power of courts to issue orders or writs of mandamus and *fieri facias* against the city of New Orleans and the officers thereof, and to declare the effect and prescribe the mode of satisfying judgments for money against the city of New Orleans.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana, in General Assembly convened*, That from and after the passage of this act, no court within the State shall have authority or jurisdiction to allow, order, hear, entertain or enforce any summary process or proceeding, or writ, or order of mandamus, or any order or proceeding in the nature of an order or writ of mandamus, or any order or proceeding in the nature of an order or writ of mandamus, either against the Controller, Deputy Controller, or any auditing officer of the city of New Orleans, either directly or indirectly, to obtain or compel said Controller or Deputy Controller, or auditing officer, to issue and deliver any order or warrant for payment of money, or against the Treasurer, Assistant Treasurer, or any officer or officers charged with the disbursement of the moneys of the city of New Orleans, the object of which shall be, either directly or indirectly, to enforce the payment of money claimed to be due from the city of New Orleans to any person, persons, corporation or corporations whatsoever, but all actions or pro-

ceedings for the recovery of any sum of money claimed to be owing by the city of New Orleans shall be in the ordinary form of action, instituted against the city of New Orleans as a corporation, and not against any branch, department or officer thereof, and shall, in all respects, be conducted in the same manner as other ordinary actions.

SEC. 2. *Be it further enacted, etc.*, That hereafter no writ of execution or *fieri facios* shall issue from any of the courts in this State against the city of New Orleans to enforce the payment of any judgment for money against the city of New Orleans, but *final* judgment against the city of New Orleans, condemning said corporation to pay any sum in money, when the same shall have become executory shall have the effect in law of establishing and fixing the amount of the plaintiff's demand against said corporation, and the plaintiff may cause (a certified copy of the said judgment, together with a copy of the plaintiff's petition and the defendant's answer in the cause in which such judgment is rendered, together with the certificate of the clerk of said court that such judgment is final and executory), to be filed in the office of the Controller of said city, and it shall be the duty of the Controller or auditing officer of said corporation to receive the same and cause the same to be registered in his office of the date on which the same shall have been presented, and when so registered it shall be the duty of the Controller to warrant on the Treasurer or disbursing officer of the corporation for the amount due thereon without any special appropriation of money therefor by the Common Council; *provided, always*, that there be sufficient money in the treasury to pay such judgments specially designated and set apart for that purpose in the annual budget or detailed statement of items of liability and expenditure required to be made by the one hundred and twenty-fourth section of the act of the Legislature, entitled an act to amend an act entitled "An Act to consolidate the city of New Orleans and to provide for the government of the city of New Orleans and the administration of the affairs thereof," approved March 20, 1856, or such laws as may be hereafter enacted relating thereto.

SEC. 3. *Be it further enacted, etc*, That in case the amount of money designated in the annual budget for the payment of judgments against the city of New Orleans at the date when any judgment against the said corporation shall have been final and executory shall have been exhausted, the Common Council shall have power, if they deem it proper, to appropriate from the money set apart in the budget or annual estimate for contingent expenses, a sufficient sum of money to pay said judgment or judgments, but if no such appropriation be made by the Common Council, then all judgments shall be paid in the order in which they shall be filed and registered in the office of the Controller from the first money next annually set apart for that purpose.

SEC. 4. *Be it further enacted, etc.*, That if, by reason of the failure of the Controller or the auditing officer of the city of New Orleans, or of the Treasurer or disbursing officer of said corpora-

tion to perform his duty, or if, by reason of the neglect or malfeasance of them, or either of them, any person, persons, corporation or corporations, shall be unjustly delayed in the payment of any judgment or demand against the city of New Orleans, or shall not be paid in their due and regular order in which such demands are entitled to be paid, and shall be prejudiced and suffer loss and damage thereby, or by reason of any unjust preference to other creditors, such person, persons, corporation or corporations so injured by the act of either of said officers, shall have a right of action against such officer or officers individually, by whose act or acts he or they have suffered loss and damage, and against the surety or sureties on the official bond of such officer, and may recover damages therefor against said officer and sureties for such amount as they may establish on the trial of such cause.

SEC. 5. *Be it further enacted, etc*, That this act take effect and be in force from and after its passage, and that all acts and parts of acts in conflict with this act be and are hereby repealed, in so far as the same conflict with any of the provisions of this act.

(Signed) MORTIMER CARR,
Speaker of the House of Representatives.

(Signed) OSCAR J. DUNN,
Lieutenant Governor and President of the Senate.

Approved, March 17, 1870.

(Signed) H. C. WARMOTH,
Governor of the State of Louisiana.

A true copy:
GEO. E. BOVEE,
Secretary of State.

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No. 133.] AN ACT.

To liquidate the indebtedness of the City of New Orleans, and to apply its assets to the satisfaction thereof; to create a board of liquidation, and prescribe their duties; and to provide for a fiscal agent and for the levying of a sufficient tax to pay said interest.

SECTION 1. *Be it enacted by the General Assembly of the State of Louisiana*, That for the purpose of liquidating, reducing and consolidating the debt of the city of New Orleans, as hereinafter specified, a permanent syndicate of six citizens of the said city is hereby created. The said syndicate shall be chosen as follows: two by the Governor of the State of Louisiana, two by the Lieutenant Governor, and two by the Speaker of the House of Representatives, and the Mayor of the City of New Orleans, the Treasurer and the Controller thereof, as hereinafter provided, shall be *ex-officio* members of said syndicate; *provided*, that in case no change is made in the present city government, the present commissioners of the consolidated debt shall act as *ex-officio* members of said syndicate, and the members of the syndicate so

named shall fill all vacancies in their number from death, resignation or otherwise.

SEC. 2. *Be it further enacted, etc.*, That the commissioners of the consolidated debt, or the city officers provided and named in section 1 of this act, and the *syndicate hereby created, shall* constitute a board of liquidation of the city debt, and the said board shall have exclusive control and direction of all matters relating to the bonded debt of the city of New Orleans The board of liquidation shall cause to be prepared bonds of the city of New Orleans, which bonds shall be used only for the purpose of negotiation or of exchange, as hereafter provided. The said bonds shall be signed by the Mayor and countersigned by the Administrators of Accounts and of Finance, or such officer or officers as may be hereafter created to fill their respective functions. They shall be made payable in fifty years from the day of the approval of this act, and bear interest at the rate of four per cent per annum, from the date of said bonds, payable, semi-annually, on the first day of April and October of each year, said interest represented by one hundred coupons annexed to each bond. The said bonds and interest coupons annexed may be issued for such sums as may be deemed most convenient by the board of liquidation, and be made payable at such place or places as may be designated in the bond; but the said bonds shall be made payable, interest and principal, in lawful money of the United States; and the said board of liquidation shall be and it is hereby empowered and authorized to establish in New York, London, Paris and Amsterdam, such agencies as they may see fit and desirable.

SEC. 3. *Be it further enacted, etc.*, That the board of liquidation of the city debt be and it is hereby authorized and empowered to retire and cancel the entire valid debt of the city of New Orleans, except the floating debt created up to the date of the passage of this act, whether represented by bonds of various classes or by judgments, either by the sale of the new bonds created under this act and appliance of proceeds to the purchase of such old obligations, or by exchange of the new bond against said old obligations, on such terms as may be agreed upon between the holders of the said old obligations and the board of liquidation; *provided*, the new bonds shall not be sold for a less sum than eighty cents, in cash, on the dollar, and that no exchange shall be made at a greater rate than fifty cents in new bonds per one dollar of the face value of the old obligation with interest accrued thereon; *and provided, further*, that the entire issue of new bonds sold or exhanged, as above provided, shall not exceed in all ten millions of dollars.

SEC. 4. *Be it further enacted, etc.*, That should any obligation of the city of New Orleans be deemed fraudulent or invalid, by any member of the board of liquidation, the same shall not be purchased, exchanged or retired until the holder of the same shall have applied to the proper court for relief, when, if final judg-

ment be in his favor, it shall be deemed to be a valid obligation of the city; and should any member of the board of liquidation knowingly audit, fund, purchase or retire, for value, any illegal obligation of the city of New Orleans, or shall use any of the bonds herein authorized, or the proceeds thereof, or any of the city's assets or property in the hands of the board, by virtue of this act for purposes other than those contemplated in this act, he shall, on conviction thereof, be punished by fine of not less than one thousand dollars and imprisonment at hard labor for not less than one year.

SEC. 5. *Be it further enacted, etc*, That it shall be the duty of the city authorities, as soon as possible after the organization of the board of liquidation of the city debt, to turn over and transfer to the said board all the property of the city of New Orleans, both real and personal, not dedicated to public use, and the board of liquidation shall be and is hereby empowered and authorized to dispose of said property on such terms and conditions as may be deemed favorable; the proceeds of such sale or sales to be deposited with the fiscal agent of the board at credit of "city debt fund."

SEC. 6. *Be it further enacted, etc.*, That nothing in this act shall be construed as affecting or in any manner impairing the Act 31 of 1876, commonly known as the "Premium Bond Act," but it will be the duty of the city authorities to turn over and transfer to the board of liqdidation of the city debt all moneys collected on account of the tax levied in accordance with the provisions of the premium bond act; and it shall be the duty of the board of liquidation to apportion the proceeds of said tax and apply the same *pro rata* and in the proportion which each form of bonded debt shall bear to the entire amount of the city's debt; and such portions of the said proceeds of tax as shall not properly belong to the outstanding amount of premium bonds shall be applied to the payment of interest on the bonds created under this act.

SEC. 7. *Be it further enacted, etc.*, That it is hereby made a felony, punishable, on conviction, by fine not exceeding five hundred dollars, and imprisonment at hard labor not exceeding ten years, for the fiscal agent or any member of the board of liquidation of the city debt to divert or misappropriate any portion of the debt and interest fund herein created from its legitimate channel, as provided.

SEC. 8. *Be it further enacted, etc.*, That the surplus arising from the collection of the debt and interest tax, or from the sale of assets in the hands of the board of liquidation of the city debt, after paying the interest coupons of the bonds issued under this act, shall be used for the purchase and retirement of any valid bonds of the city of New Orleans heretofore created at the rate not exceeding fifty cents per dollar, or, at the discretion of the board, for the retirement of the bonds created under this act at a price not exceeding par; and the bonds or obligations pur-

chased, exchanged or retired shall be canceled and destroyed by the said board of liquidation, after public notice of the same shall have been given in the official journal of the city of New Orleans, and in the presence of such witnesses as may desire to attend. A *proces verbal* of the same, giving the amounts, numbers, dates and other particulars, for identification of the obligations destroyed, shall be made out and sworn to by a majority of the board of liquidation, and published within ten days of such destruction in the official journal of the city of New Orleans.

SEC. 9. *Be it further enacted, etc.*, That the board of liquidation is required and empowered to open, keep and regulate a special book of registry of bonds of the consolidated bond series of 1880, as follows, to-wit: Any holder or owner of any of the former or old bonds of the city, issued previous to the passage of this act, upon surrendering the same for cancelment, according to the provisions of this act, shall be entitled to have the amount and number of bonds due him registered in said book, in such manner and form as the board of liquidation may determine and prescribe, whereupon, instead of giving to said party a new bond, as comtemplated by the preceding sections of this act, the board of liquidation shall grant to such party a certificate of registry, in such form as said board of liquidation may determine and prescribe, and said certificate to be transferable, in person or by proxy, on the records of the books of the board of liquidation, and the semi-annual interest on the amount of said certificates, instead of being represented by interest coupons, shall be payable to such party or his order in such form and manner as said board of liquidation may determine and prescribe; and the city of New Orleans shall cause a sufficient number of blank certificates of registry to be printed or engraved in the form and manner prescribed, and shall deliver said blanks to the board of liquidation, to be used agreeably to this section.

SEC. 10. *Be it further enacted, etc.*, That it shall be the duty of the Council of the city of New Orleans to provide a proper office for the board of liquidation of the city debt; but the expenses of engraving, printing and issuing the bonds created under this act, and all the necessary clerical and office expenses, shall be paid out of the funds appropriated and belonging to the payment of interest and principal of said bonds, *provided*, that no member of the board of liquidation shall receive any salary or emolument of any kind for his services therein.

SEC. 11. *Be it further enacted, etc.*, That the City Council be and is hereby required to levy an annual tax, calculated upon the assessment of the preceding year, less twenty per cent, sufficient to pay in full the interest on all the bonds issued under the provisions of this act, and any tax levied shall continue in force until superceded by a new levy for the same purpose.

SEC. 12. *Be it further enacted, etc.*, That all parts of all laws in conflict with this act be and the same are hereby repealed.

(Signed) R. N. OGDEN,
Speaker of the House of Representatives.

(Signed) S. D. McENERY,
Lieutenant Governor and President of the Senate.

Approved, April 10, 1880.

(Signed) LOUIS A. WILTZ,
Governor of the State of Louisiana.

A true copy:
WILL. A. STRONG,
Secretary of State.

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No. 67.] AN ACT

To amend and re-enact Sections 2, 3 and 5, of an act entitled "An Act to liquidate the indebtedness of the city of New Orleans, and to apply its assets to the satisfaction thereof; to create a Board of Liquidation, and prescribe their duties; and to provide for a fiscal agent, and for the levying of a sufficient tax to pay said interest," approved April 10, 1880; and to further provide for the redemption of the bonds authorized herein, the payment of the interest on the same, when said tax is not levied; and for the disposition and sale of said assets and other property.

WHEREAS, Due notice of the introduction of this act has been given, in accordance with Article 48 of the Constitution; and,

WHEREAS, The legislation heretofore enacted, under Article 254 of the Constitution of the State, providing for the liquidation of the indebtedness of the city of New Orleans, has in part proved inoperative;

SECTION 1. *Be it enacted by the General Assembly of the State of Louisiana*, That Section 2, of Act No. 133, approved April 10, 1880, be amended and re-enacted so as to read: That the commissioners of the consolidated debt, or the city officers, provided and named in Section 1 of this act, and the syndicate hereby created, shall constitute a Board of Liquidation of the city debt, and the said board shall have exclusive control and direction of all matters relating to the judgment and bonded debt of the city of New Orleans. The Board of Liquidation shall cause to be prepared bonds of the city of New Orleans, which bonds shall only be used for the purpose of negotiation or exchange, as hereinafter provided. The said bonds shall be signed by the Mayor and Treasurer of the city of New Orleans, and countersigned by the Controller of said city; they shall be dated June 1, 1884, and be made payable in fifty years from said date, or sooner, at the option of the city, and bear interest at the rate of five per cent per annum from the date of said bonds, payable semi-annually on the first days of June and December of each year; said interest to be represented by one hundred coupons annexed to each bond. The said bonds and interest coupons annexed may be issued for such sums as may be deemed most convenient by the Board of Liquidation, and be made pay-

able at such place or places as may be designated in the bond, but the said bonds shall be made payable, interest and principle, in lawful money of the United States.

SEC. 2. *Be it further enacted, etc.*, That Section 3, of Act No. 133, approved April 10, 1880, be amended and re-enacted so as to read: That the said Board of Liquidation of the city debt be and it is hereby authorized and required, and it is made the duty of the said board, to retire and cancel the entire debt of the city of New Orleans now in the form of executory judgments and registered, under the provisions of Act No. 5, of 1870, and that which hereafter may become merged into executory judgments and likewise registered; except the floating debt or claims created for and against the year 1879, and subsequent years; that it is the full intent and meaning of this act to apply solely the privileges thereof to executory judgments, at present rendered against such city, and to such floating debt or claims against said city for 1878, and previous years merged and to be merged into executory judgments, whether absolute or rendered against the revenues of any particular year or years, previous to the year 1879; that for the purpose of retiring and canceling said judgment debt, the said board is authorized and required either to sell the bonds to be issued under this act at not less than their par value and apply the proceeds thereof to the payment of the said judgments, as above specified, or issue said bonds in exchange for said judgments.

SEC. 3 *Be it further enacted, etc.*, That Section 5 of Act No. 133, approved April 10, 1880, be amended and re-enacted so as to read: That it shall be the duty of the city of New Orleans to turn over and transfer to the Board of Liquidation, immediately after the passage of this act, all property of the city of New Orleans, real and personal, not dedicated to public use; *provided*, that in the sale of batture property, which is herein included, the right of the city to all future accretions shall be reserved, all assets of said city realized, and to be realized, except such assets and revenues as pertain to the administration of said city, and necessary for the support of the same as at present authorized, all uncollected revenues of said city anterior to the year 1879, when collected; and the said board is hereby authorized and required to dispose of said property and assets, other than stock held in corporations, on such terms and conditions as said board may deem to be to the best interests of the city, and apply the proceeds thereof, together with the uncollected revenues above mentioned, when the same are collected: First, to the payment of the interest on the bonds authorized herein in the event that the tax authorized by section eleven of said Act No. 133, approved April 10, 1880, be not levied; Second, to the redemption and cancellation of the said bonds; *provided*, that bids for the sale of the same shall be by sealed proposals, and that preference shall be given to the lowest bidder; and *provided, further*, that no bids above the par value of said bonds shall be accepted.

SEC. 4. *Be it further enacted, etc.*, That for the further redemption of said bonds the said Board of Liquidation is hereby authorized and required after each and every allotment of series following the passage of this act, to advertise for sealed proposals for the exchange of drawn premium bonds in possession of the city for the bonds authorized herein to the amount of fifty thousand dollars, of said bonds issued under this act; *provided*, that no exchange be made unless preference be given to the lowest bidder.

SEC. 5. *Be it further enacted, etc.*, That nothing shall herein be construed as in any manner affecting or interfering with the disposal of property of said city, created under the provisions of Act No. 33, approved March 31, 1877, otherwise than is provided for in section 14 of said act.

SEC. 6. *Be it further enacted, etc.*, That all laws or parts of laws in conflict herewith be and the same are hereby repealed.

H. W. OGDEN,
Speaker of the House of Representatives.
CLAY KNOBLOCH,
Lieutenant-Governor and President of the Senate.
Approved 9th July, 1884.
S. D. McENERY,
Governor of the State of Louisiana.
A true copy from the original:
OSCAR ARROYO,
Secretary of State.

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No. 31.] AN ACT

To adjust, regulate and provide for the bonded debt of the city of New Orleans; to authorize the exchange of bonds of the city of New Orleans for other bonds, to be issued on the plan known as the premium bond plan; to adopt and give legislative sanction to the said plan, as set out in ordinances Nos. 3130 and 3233, Administration Series of the city of New Orleans, approved on May 25 and August 31, 1875; to provide a fund to meet the semi-annual payments of the said bonds, known as premium bonds; to create a commission in the interest of creditors, and to give said commission the direction, control and management of the semi-annual allottments under said premium bond plan; to limit by contract the contracting of debt by the city of New Orleans; to limit taxation for all purposes therein, and to give relief to arrear taxpayers; to provide for the exchange of said premium bonds for other bonds in a certain contingencey.

SEC. 6. *Be it further enacted, etc.*, That it shall be the duty of the City Council, in the month of December of each year, or in the annual budget annually adopted for the ensuing year, to include an amount sufficient to meet and pay the principal and interest of the premium bonds, together with premium included, in the several allottments of series and premiums fixed for such year by the aforesaid ordinances and this act. It shall be the duty of the Council annually to levy an

equal and uniform tax on all assessed property within the corporate limits of the city, at a rate sufficient to provide the amount included in the budget as aforesaid, and said tax so levied shall constitute a special fund to be used for no other purpose than the payment of said bonds and interest on the said premiums comprised in said allottments, and the funds so raised shall be placed to the credit of an account to be called the premium bond account, and no money from said fund shall be paid out except on the joint authority of the commissioners of the consolidated debt. The said tax so to be raised shall be denominated the premium bond tax, and shall be separately mentioned in the tax rolls and receipts; *provided*, that the taxable power of the corporation of the city of New Orleans, for all purposes, including general administration, school, police, lighting, salary of officers, court expenses, and every other purpose of government, including the sum to be raised to pay the premium bonds, as above stated, shall never, until the full, complete and final payment of the said premium bonds, exceed the rate of one and one-half per centum on the dollar of all the assessed value of property subject to taxation within the limits of the said city of New Orleans. The above limitation of the taxable power of the corporation is hereby declared to be a contract, not only with the holder of the said premium bonds, but also with all residents and taxpayers of the said city, so as to authorize any holder of said premium bonds, resident or taxpayer, to legally object to any rate of taxation in excess of the rate herein limited. It being also a part of the consideration of this contract that the city of New Orleans shall be incompetent to incur any debt or obligation, as now provided by the constitution of this State, until the final payment and extinction of the premium bonds aforesaid.

(Signed) E. D. ESTILETTE,
Speaker of the House of Representatives.

(Signed) C. C. ANTOINE,
Lieutenant Governor and President of the Senate.

Approved March 6, 1876.

(Signed) WILLIAM P. KELLOGG,
Governor of the State of Louisiana.

A true copy:
P. G. DESLONDE,
Secretary of State.

OCT 30 1899
JAMES H. McKENNEY
CLERK

IN THE

# Supreme Court of the United States

No. 1,234.

JAMES WALLACE PEAKE, Appellant,
vs.
THE CITY OF NEW ORLEANS, Appellee.

No. 780.

JAMES WALLACE PEAKE, Plaintiff in Error,
vs.
THE CITY OF NEW ORLEANS, Defendant in Error.

## SUPPLEMENTAL BRIEF IN BEHALF OF THE CITY OF NEW ORLEANS.

CARLETON HUNT,
*City Attorney of New Orleans.*

GEDNEY & ROBERTS, WASHINGTON.

IN THE

# Supreme Court of the United States

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THE CITY OF NEW ORLEANS, Defendant in Error.

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## Supplemental Brief in Behalf of the City of New Orleans.

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Complainants will have it, that the constitutionality of the drainage acts of 1858, 1859 and 1861, have been upheld in the matter of the *Commissioners of the First Drainage District*, 27th Louisiana Annual Reports, p. 72. They contend that the decision in question is in conflict with that in the *Succession of Irving, 33 Louisiana Annual Reports, p. 68*, with that in *The Matter of the Board of Administrators praying, etc., 34th Louisiana Annual Reports, p. 97*, and with that in *State ex rel. Canal Company vs. City et al., 35th Louisiana Annual Reports, p. 70.*

The position of complainants is understood to be, that in presence of a conflict as assumed, the Supreme Court of the United States will attach no weight to the judgments of the Supreme Court of Louisiana in the cases here cited, in behalf of the City of New Orleans, and which declare Act 30, of 1871, unconstitutional, null and void.

Examination of the decision in the case in 27th Annual referred to, will, it is believed, satisfy the Court, that the constitutionality of the drainage acts was not there taken into consideration, by the Supreme Court of Louisiana.

The judgment of the Court in the case in *27th Louisiana Annual* follows, undoubtedly, the very terms of the act of 1861.

The judgment can, however, necessarily possess no other effect than the statute is able to give. Just what that amounts to, has been sufficiently debated elsewhere.

It is not denied, that there were oppositions in the case to the homologation of the tableau filed by the Drainage Commissioners of the First Drainage District. That by William O. Denegre sets up, that the act of 18th of March, 1858, is contrary to Article of the Constitution of the State, and of the United States. It is also pleaded in this opposition that the assessment under the act of 1858, is not equal and uniform, but is unjust and oppressive, and in violation of the Constitution of the State. Record, p. 415.

In the case in question, Mrs. Ray also interposed an opposition to the tableau. Her opposition, in the relation now involved, was that the plaintiffs are not entitled to a judgment *in personam*. And, again, that the law upon which plaintiffs based their demand is not and never has been a a law of the State, the constitutional requirement having not been complied with, to give it the authority of law. Record, p. 415.

The remaining opposition insisted upon by complainants is that of Patrick Irwin. This is understood to be particu-

larly pressed upon the Court. Indeed, the opposition of Irwin, is the chief topic of complainants' second supplemental brief.

Scrutiny of the record will show, that the opposition of Irwin propounded a case against the homologation of the assessment rolls or tableau, resting among other grounds, on the following:

1st. Because the acts of the Legislature of the State of Louisiana, of the 18th of March, 1858, No. 165, and the act of the 17th of March, 1859, No. 191, are no longer in force, but are repealed by an act of the Legislature approved on the 16th day of March, 1870, No. 4.

2nd. Even if said acts are not repealed that the same are null and of no effect, for this: That said acts contravene the provisions of Articles Nos. 105 and 123 of the Constitution of the State of Louisiana, of 1852, and are in violation of the provisions of Articles 110 and 118 of the present Constitution of the State.

3d. Because the act of the 17th of March, 1859, was and is likewise repugnant to and in violation of Articles 115 and 116 of the Constitution of 1852, and contravenes Articles 114 and 115 of the present Constitution, and because the act of the General Assembly of this State, of 1871, No. 30, is likewise in violation of the same Articles of the then Constitution of the State of Louisiana, and because all of said acts are repugnant to the Constitution and laws of the United States.

Now such as these reasons for opposition are, it is quite clear, that in point of fact they received no consideration at all in the case in 27th Annual Reports, and were not thereon passed upon. Justice Howell, who gave the opinion, actually begins it, with the announcement that the bench deemed it *unnecessary to consider constitutional questions.* The Court leaves no room for misunderstanding on this head. The Justice proceeds as follows:

"We think it necessary to consider only the following grounds of opposition herein, as argued before us:

"1. That some of the land upon which this assessment is levied was drained at their own cost, under Act No. 49, of 1839, and are by the 13th section thereof specially and forever exempted from any further assessment for drainage.

"2. That by Act 165, of 1858, the assessments for draining any one section or district, shall not exceed $350,000, which sum has already been nearly exhausted, and the present assessment is for $450,000 additional.

"3. That the money cannot be collected in advance of the completion of the work."

After considering the above objections *seriatim*, the Court adds:

"There are other grounds of opposition in the Record, but they *have not been urged* before us, and we find nothing in them demanding attention."

Sight is not lost of the fact, that Justice Howell assigned as a reason, for avoiding judicial expression relative to constitutional topics in the case, in 27th Annual Reports, the fact that the same had been decided in the case of the Drainage Company, 11th Annual Reports.

What the constitutional question actually was, on which Justice Howell depended, as having been precedently ruled by the Supreme Court of Louisiana in the memorable case of the Drainage Company praying, etc., reported in 11th Louisiana Annual Reports, p. 338, may be readily seen by reference to the case in question. Generally speaking, the doctrine of the Court in that suit was *that the Legislature had the power to drain the swamps in the rear of the city of New Orleans* [*notwithstanding the article of the Constitution securing to the citizens of New Orleans the right to appoint their public officers*], *and either by the city itself directly, or by its own agents, and had the power to drain them by the intervention of a company created for that purpose.* Whether this was, or was not,

the true doctrine, was the great contention then before the Court. This was determined at first adversely to the Drainage Company, but afterwards a change in the composition of the bench having intervened, there was a final decision in favor of the Company.

The case arose under the act of 1839.* That act having been repealed, it is not necessary to discuss it in this case. Nothing, however, can be clearer, it is believed, than that what *was* said regarding the act of 1839 by the Court, was not designed to touch upon the objections like those of *Denegre*, of *Ray*, and of *Irwin*, relating, as those oppositions evidently do, solely and peculiarly to the drainage legislation of many years later.

It remains, to observe, upon the contention of the complainants, that the expenses thrown upon the City of New Orleans for streets in the matter of *The Drainage Company praying, etc., 11th Annual, p. 377*, must be taken as conclusive of the liability in the case now before the Court, of the City, for drainage assessments laid upon Public Things.

It has been remarked, that the *Drainage case in 11th Louisiana Annual Reports* arose under the act of 1839, and that this act has been repealed. It may be added, that the case ‡ stands by itself, and that no rule of jurisprudence, using the term in its narrower sense, ~~can be~~ is necessarily established by a single adjudication.** It is to be said, besides, that the question of the liability of Public Things to be assessed for drainage, was evidently not made a formal, if any question, in the case referred to. The arguments in the case are printed at unusual length, and it is submitted prove this. It happens that the learned Judge who gave the opinion of the Court, considering there was, as urged on him, some equity in having the streets contribute, indulged in the observation, it is submitted *obiter, that he thought there was.* He had necessarily no estimate, when he so spoke, of the bearing which this general reflection might have attributed to it. Other-

* amends the act of 35.

‡ as it regards Public Things

** Smith vs Smith, 13th. La. Reports. 435.
Lapeyrouse vs. Barré, 11th. Robinson La. Reports 302

wise, of course, he would have spared it. He would not have left in the books a decision, which is not only altogether singular in the regard here treated, in making the public domain liable to assessments, under a law containing no provision whatever therefor, but which must, as a matter of course, remain forever isolated. He would not, and he could not, had he designed to speak in the present connection critically, and to lay down a rule for future action, have spoken properly of Public Things as included under provisions of law made for individual property.

*In Carroll vs. Lessee of Carroll, 16 Howard, p. 275*, this Court says: "General expressions in an opinion are to be "taken in connection with the case in which those express- "ions are used. If they go beyond the case, they may be "respected, but ought not to control the judgment in a sub- "sequent suit when the very point is presented for decision."

The opinion of the Court in the Drainage Case, 11 Louisiana Annual Reports, recognizes the principle of assessing by superficial area, ~~with the greatest~~ not without reluctance, and as necessary to be allowed, ~~only~~ *to escape in that particular litigation the greater evil of remanding the case.*

*In Thomas vs. Gain, 35th Michigan, p. 155*, where the opinion is by Judge Cooley, the application of this principle was expressly declined in a case of a special assessment for a sewer. And in TIDE-WATER COMPANY VS. COSTER, 18 New Jersey Equity Reports, p. 521, where as in the case before the Court, much was said upon the value likely to result to the land designed to be improved, Chief Justice Beasley distinctly declares: "I have no hesitation in saying, that in my opinion, any arrangement by which the compensation of the appellants, for the work to be contracted for, should be made to turn in any degree whatever on the future value of the land, and which by any possibility could be in evident excess of the real cost of the works, would be illegal and void. Such an arrangement could not receive,

as I think, judicial sanction under any circumstances, unless with the assent of all the owners of the land. The Legislature would not be competent to authorize a contract of that description."

It is left to say that the legislation regarding paving cases in New Orleans has not been without changes. The latest case, *Barber Asphalt Paving Company vs. Cosgrove, 41 Louisiana Annual, p. 251*, being a very full one, may, if the matter be thought of sufficient interest, referred to.

Respectfully submitted,

CARLETON HUNT,
*City Attorney of New Orleans.*